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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 926

BETHLEHEM STEEL COMPANY and MARYLAND SHIPBUILDING & DRYDOCK COMPANY, *Petitioners,*

v.

UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

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No.

BETHLEHEM STEEL COMPANY and MARYLAND SHIPBUILDING & DRYDOCK COMPANY, *Petitioners*,

v.

UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Bethlehem Steel Company and Maryland Shipbuilding & Drydock Company petition for a writ of certiorari to review the judgment of the United States Court of Customs and Patent Appeals entered in this case on August 4, 1966.

OPINIONS BELOW

The opinion of the United States Customs Court (R. 114-127),[1] printed in Appendix A hereto, *infra,* pp. 1a-15a, is reported in 238 F. Supp. 483. The opinion of the Court of Customs and Patent Appeals, printed in Appendix B hereto, *infra,* pp. 16a-34a, is unreported.

JURISDICTION

The judgment of the Court of Customs and Patent Appeals was entered on August 4, 1966. Rehearing was denied on October 6, 1966. A copy of the judgment of which review is sought is printed in Appendix C hereto, *infra,* p. 35a. The jurisdiction of this Court is invoked under 28 U.S.C. 1256.

QUESTION PRESENTED

Petitioners brought to the United States, under tow, two ship "midbodies", each of which was built according to accepted standards for the construction of watercraft, was over 500 feet long, had a cargo capacity of over 12,000 tons, was manned by a crew of eight, carried all necessary navigational lights and marine insurance, and, upon arrival in this country, was suitable for use as a barge in the commercial transportation of cargo. The midbodies were intended for ultimate use as cargo sections of Great Lakes ore carriers.

The question presented is whether the Court of Customs and Patent Appeals correctly held that the midbodies were not vessels, and were therefore subject to customs duty, although the midbodies met all factual, statutory, and established judicial tests as to what constitutes a vessel.

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[1] Record references herein are to the Transcript of Record as printed for the use of the court below.

STATUTE INVOLVED

Title 1 U.S.C., § 3, Act of July 30, 1947, c. 388, § 1, 61 Stat. 633, derived from R.S., § 3, provides:

> "The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."[2]

STATEMENT

The midbodies[3] here in controversy were built in European shipyards and, in 1961, were brought to this country on their own bottoms under tow (R. 7, 13, 26, 102). Upon their arrival here, the Collector of Customs at Baltimore, Maryland, assessed duties with respect to the midbodies, as articles not specially provided for, manufactured in chief value of steel, at the rate of 19 per cent ad valorem (R. 9, 14). Petitioners filed protests (R. 7-8, 13), pursuant to section 514 of the Tariff Act of 1930 (Act of June 17, 1930, c. 497, § 514, 46 Stat. 734, 19 U.S.C. 1514), on the ground, *inter alia,* that the midbodies are vessels and are therefore not subject to duty under the rule of *The Conqueror*, 166 U.S. 110. In accordance with section 515 of the Tariff Act of 1930 (Act of June 17,

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[2] An almost verbatim definition of "vessel" is contained in the administrative provisions of the Tariff Act of 1930. Act of June 17, 1930, c. 497, § 401(a), 46 Stat. 708, 19 U.S.C. 1401(a).

[3] A midbody is the mid-section of a freighter. Following the conclusion of World War II, there was a surplus of T-2 and T-3 tankers in the United States, and it was discovered that they could be more efficiently used if their mid-sections were enlarged. This was done by separating the bow and stern sections of the tanker from its center section and inserting a newly-built and larger mid-section or midbody. Some midbodies were built in the United States; others abroad. App. B, *infra*, p. 17a; R. 18-19.

1930, c. 497, § 515, 46 Stat. 734, 19 U.S.C. 1515), the protests, following affirmance by the Collector of his decisions (R. 9, 14), were transmitted to the Customs Court, where they were consolidated for trial (R. 18, 114).

At the trial the uncontroverted evidence[4] showed that the midbodies were built in accordance with conventional shipbuilding designs, plans, and specifications, prepared by naval architects, which conformed to the accepted standards for the construction of vessels and were approved by governing bodies such as the American Bureau of Shipping, the United States Coast Guard, and the United States Public Health Service (R. 26-27, 29-32, 43, 47-48, 101-102; App. A, *infra,* p. 3a; 238 F. Supp. at 484-85. They were brought to this country under tow (R. 42, 102).

Each of the midbodies was over 500 feet long (R. 26, 101), and had a cargo capacity of between 12,000 and 14,000 tons (R. 44-45, 47, 106). In order to facilitate their transatlantic voyages, each was equipped with a temporary bow and a strengthened stern (R. 26, 33-34, 40-41, 102, 108, 110). Each craft had crew quarters and carried a crew of eight men, each of whom had signed ship's articles for the crossing (R. 38, 41-42, 101-102). Each midbody was equipped with light, heat, food, life rafts, life preservers, anchor, and a generator for light, heat, and messing, and carried the navigational lights and signals required of vessels to comply with navigational rules of the road and

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[4] The evidence in the case was adduced exclusively by petitioners. None was adduced on behalf of the United States. Nor, as found by the court below (App. B, *infra,* p. 19a) did respondent challenge any of the petitioners' evidence.

to indicate that the craft was under tow (R. 38-39, 41, 101-102; App. A, *infra,* pp. 3a-4a; 238 F. Supp. at 485). In addition, each midbody carried marine insurance against damage to or loss of the craft in transit, and which also covered the crew of eight who manned the craft while crossing the ocean (R. 36; App. A, *infra,* p. 4a; 238 F. Supp, at 485). Although designed for ultimate use as cargo sections of self-propelled ore carriers on the Great Lakes, the mid-bodies were, upon their arrival in this country, suitable for use as vessels of the barge type for the commercial transportation of cargo[5] (R. 40, 45-47, 79-80, 82, 89-90, 98, 102-103, 106; App. A, *infra,* p. 3a; 238 F. Supp. at 485).

The Customs Court, after carefully reviewing the evidence and the judicial precedents as to the factors determining what constitutes a vessel (App. A, *infra,* pp. 3a-13a; R. 115-124; 238 F. Supp. at 484-89), held (App. A, *infra,* pp. 13a-15a; R. 125-26; 238 F. Supp. at 489-90):

> "Of course, the tariff status of the craft must be determined by their *utility* or *capability for use* at the time of their arrival in the United States.
>
> "At that time, they had been towed on their own bottoms several thousand miles across the Atlantic Ocean.
>
> "They were seaworthy.
>
> "They had been constructed in accordance with designs, plans, and specifications carefully drawn by skilled naval engineers and architects to meet the rigid and accepted standards of navigational requirements.

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[5] Indeed, the record clearly shows a number of instances where midbodies, of the same type as petitioners', have actually been used to carry cargo. R. 102-105.

"They were launched in European shipyards as other watercraft would be launched.

"They floated and were fully equipped for proper and safe navigation under tow to the United States.

"They were capable of transporting cargo if their owners elected to use them for that purpose.

"They had the physical appearance of certain watercraft commonly seen in the harbors of our port cities used as barges being towed.

"The mere fact that the midbodies were to become the midsections of ore carriers did not destroy their original character as watercraft *capable of being used* as a means of transportation in water.

* * * * *

"In our opinion, the evidence places the contested midbodies within the class of watercraft judicially recognized as 'vessels.'

* * * * * *

"It is the considered opinion of the court that the subject midbodies are 'vessels' within the statutory meaning of that term and, accordingly, should not be subject to customs duties."

On appeal, the Court of Customs and Patent Appeals adopted the Customs Court's statement of the evidence, and conceded that the following, which it quoted from the opinion of the Customs Court, "accurately summarizes the case law":

"It seems highly incongruous and unbelievable that Congress could have intended that scows, dredges, barges, elevators, log rafts, houseboats, and old hull converted into a wharf boat, and so many inferior craft should be classified as vessels (as held by the courts) and at the same time have intended that a staunch seagoing craft, possessing the requisite navigational qualifications possessed by these midbodies, should be relegated

to the unenumerated catchall provision * * * as articles of metal". (App. B, *infra,* p. 32a)

Nevertheless, the court below held that the midbodies were not vessels and accordingly "are not entitled to duty-free status" (App. B. *infra,* p. 34a), and reversed the judgment of the Customs Court. The gist of the opinion below appears to be that the mid-bodies, having been "designed and intended" for the purpose of becoming mid-sections of ore carriers, could not themselves be vessels.

REASONS FOR GRANTING THE WRIT

1. The midbodies fit perfectly both aspects of the definition of vessel prescribed by 1 U.S.C. 3, in that (1) they were being *used to transport* eight men across the Atlantic Ocean and had been so used in the crossing and (2) they were *capable of being used as a means of water transportation* for both cargo and crew. It was not for failure of the midbodies to meet the factual, statutory, or established judicial tests as to what constitutes a vessel that caused the court below to hold that they were not vessels. Rather, it was that the court below sought to add a new criterion, one that looked to the ultimate disposition of the midbodies. To the court below the critical factor was that the midbodies were "designed and intended" "to serve as midsections of ore carriers." (App. B, *infra,* pp. 33a-34a). Of course the long-range intention with respect to the midbodies was that they should become mid-sections of ore carriers, and they were designed with that in mind. But that does not deny that the midbodies had been designed first to cross the ocean; and that they did so. Also, they were intended to be, and were capable of being, used as means of transportation—they could

not have come to this country otherwise than by transporting themselves and their crews. That they were to serve another purpose after arrival in the United States is irrelevant.

This looking to the future, as the court below did, to determine whether something brought into this country is subject to customs duty is in direct conflict with the fundamental rule that the tariff status of an article is governed by its condition at the time of arrival in the United States. *United States* v. *Schoverling,* 146 U.S. 76; *Worthington* v. *Robbins,* 139 U.S. 337; *Leonard Levin Co.* v. *United States,* 27 C.C.P.A. 101, 105 C.A.D. 69; *The Altenburg,* 21 Treas. Dec. 275, T.D. 31898 (Bd. of Genl. Appraisers, 1911). Eliminating, as these cases teach, petitioners' intentions regarding the future, post-arrival disposition or use of the midbodies, they were vessels in every relevant factual sense and met the criteria of 1 U.S.C. 3 as the language of the statute plainly reads and as it has been construed and applied by this Court, by the United States Courts of Appeals, by the court below itself, and by other courts.

All the statute (1 U.S.C. 3) required of the midbodies, in order that they be regarded as vessels, was that they be "used, or capable of being used, as a means of transportation on water." This is the rule applied by this Court in *Norton* v. *Warner Co.,* 321 U.S. 565, holding that a non-self-propelled barge was a vessel "even when it has no motive power of its own, since it is a means of transportation on water." 321 U.S. at 571.

The decision below, in looking beyond this to petitioners' intended future use of the midbodies, is in conflict with *The International,* 89 Fed. 484 (C.A. 3). There, a Collector of Customs had levied duty on a

dredge and scows, but the owner, claiming that they were vessels and therefore not subject to duty, successfully libeled the craft. The court dismissed as immaterial the facts that the dredge *was not intended* to carry passengers and cargo, the scows could carry only mud, and none of the craft was self-propelled, and held with reference to R.S. § 3, the predecessor statute to 1 U.S.C. 3 (89 Fed. at 485):

> "The terms of this provision are broad and unqualified. The word 'transportation' is not expressly or impliedly limited to the carriage of passengers or merchandise for hire. A pleasure yacht or an ice boat is a vessel within the meaning of the section, equally with a merchantman or an ocean liner * * * While the dredge was not intended or adapted for the carriage of merchandise or passengers, and did not possess the power of self-propulsion except to an inadequate extent through the use of its steam shovel or dipper as a paddle, it was nevertheless a water craft 'used, or capable of being used, as a means of transportation on water.'"

The decision below likewise conflicts with the application of 1 U.S.C. 3 in *Pleason* v. *Gulfport Shipbuilding Corporation*, 221 F. 2d 621 (C.A. 5). There, the CAROL ANN, a partly scrapped shrimp boat that could still be towed, was held to be a vessel under 1 U.S.C. 3 for the purpose of asserting a maritime lien against it,[6] the court saying (at 623):

> "The 'Carol Ann' was an artificial contrivance capable of being used as a means of water transportation. It was afloat. * * * It had a deck; it

[6] It has long been clear, as recognized by the court below and its predecessor court (see *Hitner Sons Co.* v. *United States*, 13 Ct. Cust. App. 216, 219, T.D. 41175) that in determining what is a vessel, admiralty cases are regarded as pertinent and persuasive in customs cases.

> had cabins, it had superstructure. It had no motive power of its own; no steering mechanism, but it definitely was capable of being used as a means of transportation under tow."

It was their *use or capability of use as means of water transportation* that made the dredge and scows in *The International,* and the CAROL ANN in *Pleason,* vessels; intention had nothing to do with it.

Many cases, in addition to the foregoing, teach that maritime craft with fewer navigational characteristics than petitioners' midbodies are nevertheless vessels. In *Senko* v. *Lacrosse Dredging Corp.,* 352 U.S. 370, a case under the Jones Act (Act of June 5, 1920, c. 250, § 33, 41 Stat. 1007, 46 U.S.C. 688), the benefits of which have been restricted to "members of a crew of a vessel" (see *Swanson* v. *Marra Bros.,* 328 U.S. 1), while the question was not raised as to whether a dredge was a vessel, the Court in its opinion, and the dissenting Justices as well, assumed it to be such. See 352 U.S. at 371, fn. 1, and at 375, fn. 1. Moreover, in *Gianfala* v. *Texas Co.,* 350 U.S. 879, a case that involved an oil drilling barge, this Court cited as the basis of its *per curiam* opinion decisions of the courts of appeals for the first, fourth, and sixth circuits in which those courts had held that a floating derrick engaged in pouring concrete for the building of a bridge and non-self-propelled dredges and barges were vessels. See also *Marine Drilling Company* v. *Autin,* 363 F. 2d 579 (C.A. 5); *Producers Drilling Company* v. *Gray,* 361 F. 2d 432 (C.A. 5).[7]

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[7] It is anomalous that the court below held that petitioners' midbodies were not vessels, although it is clear that had one of the seamen who sailed petitioners' midbodies to this country suffered an injury, Jones Act relief would have been available to him as a member of a crew of a vessel.

In *United States* v. *Tug Parris Island,* 215 F. Supp. 144 (E.D.N.C.), the only reported case involving the question whether, specifically, a midbody is a vessel, the United States brought an action in admiralty against a T-2 tanker midbody for damage it had inflicted while under tow in collision with the Coast Guard cutter CHILULA. The Court, while holding the midbody not liable because it was under the exclusive control of its tug, found that there was no dispute that the tanker midbody was a vessel. 215 F. Supp. at 148. Indeed, the Government itself, both in bringing the action and in opposing a motion to dismiss the libel *in rem* against the midbody, considered, treated, and referred to the midbody as a vessel.

The decision below cannot be squared with any of the foregoing cases,[8] or with the many other cases cited in the opinion of the Customs Court (App. A, *infra,* pp. 6a-11a; R. 118-124; 238 F. Supp. at 486-88). As watercraft used and capable of being used as means of water transportation, the midbodies were, at the time of their arrival in the United States, vessels in every sense of the definition provided by the Congress in 1 U.S.C. 3 as it has been judicially applied.

2. As vessels, the midbodies were not subject to duty. The duty-free status of vessels, at the time the midbodies were brought to the United States, rested not upon specific statutory provisions, but upon the decision in *The Conqueror,* 166 U.S. 110. As this Court there said, the Congress had recognized from 1789 onward "that vessels should be treated as a class by them-

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[8] The decision below also cannot be squared with earlier decisions of the court below and its predecessor court (*Thornley & Pitt* v. *United States,* 18 C.C.P.A. (Customs) 265, T.D. 44428; *Hitner Sons Co.* v. *United States,* 13 Ct. Cust. App. 216, T.D. 41175).

selves, and not within the general scope of the tariff acts." 166 U.S. at 121.

The reliance by the court below, and by the Government in that court, on *H. W. Chadbourne* v. *United States,* 27 C.C.P.A. (Customs) 85, C.A.D. 66, is misplaced. The yacht in that case was dutiable because by paragraph 370 of the Tariff Act of 1930, Act of June 17, 1930, c. 497, Par. 370, 46 Stat. 625, the Congress had subjected that species of vessels to duty, and not, as argued below (see App. B, *infra,* pp. 30a, 32a), "to encourage industries of the United States and protect American labor." If that expresses the congressional purpose in subjecting yachts to the tariff laws, it is very clear that the Congress did not feel it necessary to extend the tariff for that or any other reason to vessels generally. Nor has the Congress done so to this day. On the contrary, it is the rule of *The Conqueror* that is now codified in the Tariff Schedules of the United States. Tariff Classification Act of 1962, Act of May 24, 1962, 76 Stat. 72, 19 U.S.C. 1202. General Headnote 5 of the Tariff Schedules, 19 U.S.C. 1202, paragraph 5, specifically excludes from the "articles subject to the provisions of these schedules" "(e) vessels which are not 'yachts or pleasure boats' within the purview of subpart D, part 6, of schedule 6." Thus *Chadbourne,* as the result of congressional enactment pertaining to yachts, exemplifies the exception to the rule of *The Conqueror* that vessels are not subject to customs duties.

The ancient distinction, expounded in *The Conqueror,* between goods, wares, and merchandise, which are subject to duty, and vessels, which are not, remains valid to this day. The argument below regarding encouraging American industry and protecting American labor is one properly addressed to the Con-

gress. Until the Congress speaks and subjects vessels or particular species of vessels to customs duties, as it did with respect to yachts, the rule of *The Conqueror,* now embodied in the Tariff Schedules, stands as the law. The decision below cannot stand along side it, and must therefore be reversed.

3. The question presented is vitally important to the shipping industry. Its determination will do more than resolve the tariff status of petitioners' two midbodies here in controversy, involving customs duties of $453,142. Petitioners' counsel also represent the owners of 20 other midbodies who have cases pending before the various Collectors of Customs, involving customs duties of $4,537,694,[9] and as to these also this

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[9]

Owner	Port of Entry	Duty Paid
Sea-Land Ships, Inc.	Baltimore	$333,184.76
Sea-Land Ships, Inc.	New York	303,930.65
Sea-Land Ships, Inc.	New York	351,670.05
Sea-Land Ships, Inc.	New York	303,930.65
Paco Tankers, Inc.	San Francisco	215,673.37
Paco Tankers, Inc.	San Francisco	210,843.19
Chas. Kurz & Co., Inc.	San Francisco	189,956.68
Keystone Shipping Co.	San Francisco	198,393.82
American Shipbuilding Co.	Cleveland	227,649.64
American Shipbuilding Co.	Cleveland	230,916.14
Bethlehem Steel Co.	Baltimore	105,485.34
Bethlehem Steel Co.	Boston	114,329.71
Maryland Shipbuilding & Drydock Co.	Baltimore	204,368.75
Maryland Shipbuilding & Drydock Co.	Baltimore	213,106.28
Maryland Shipbuilding & Drydock Co.	Baltimore	204,231.57
Maryland Shipbuilding & Drydock Co.	Baltimore	223,018.20
Maryland Shipbuilding & Drydock Co.	Baltimore	214,768.59
Maryland Shipbuilding & Drydock Co.	Baltimore	213,196.53
Todd Shipyards Corporation	New York	236,183.36
Todd Shipyards Corporation	New York	242,856.73

litigation will be dispositive on the issue here presented. In addition, counsel for petitioners know of six other pending cases where the "vessel" issue has similarly been raised. It is estimated that the customs duties involved in all these cases exceed six million dollars. It is important that the principle that will govern the determination of these many pending cases on the issue here presented be consistent with 1 U.S.C. 3 and with the decisions of this Court and of the United States Courts of Appeals, discussed *supra*, construing and applying that statute.

American shipowners have, moreover, a continuing interest in bringing foreign-built midbodies to the United States for subsequent incorporation into rebuilt merchant ships. While such rebuilt ships may no longer engage in the coastwise trade (Act of July 5, 1960, 74 Stat. 321, § 1, 46 U.S.C. 883), there are other avenues of profitable merchant shipping open to them. The question presented, therefore, not only has an immediate impact on the American shipping industry, that can be measured in terms of not inconsiderable amounts of money, but also a substantial impact on the economic health and welfare of that industry in the foreseeable future.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES CUSTOMS COURT, SECOND DIVISION

(C.D. 2500)

BETHLEHEM STEEL COMPANY, MARYLAND SHIPBUILDING & DRYDOCK CO.

v.

UNITED STATES

Protests 63/17334-15787 and 63/19252-15878 against the decision of the collector of customs at the port of Baltimore

(Decided December 30, 1964)

LAWRENCE, Judge:

The Bethlehem Steel Company and the Maryland Shipbuilding & Drydock Co., plaintiffs herein, brought into the United States at the port of Baltimore, Md., two so-called "midbodies."

They were classified by the collector of customs within the provision for "Articles or wares not specially provided for, whether partly or wholly manufactured * * * in chief value of steel" in paragraph 397 of the Tariff Act of 1930 (19 U.S.C. § 1001, par. 397), as modified by the Sixth Protocol of Supplementary Concessions to the General Agreement on Tariffs and Trade, 91 Treas. Dec. 150, T.D. 54108, and duty was imposed thereon at the rate of 19 per centum ad valorem.

Pursuant to the provisions of section 514 of said act (19 U.S.C. § 1514), the plaintiffs filed protests 63/17334 and 63/19252, respectively, which have been consolidated for trial.

Plaintiffs rely upon the claim that the midbodies are not "Articles or wares" within the meaning of paragraph 397, *supra*, but are "vessels," as defined in section 401(a) of said act (19 U.S.C. § 1401(a); also section 3, 1 U.S.C.,

and as such, under the time-honored doctrine announced in *The Conqueror* case, 166 U.S. 110 (1897), are exempt from customs duties. That decision will be reviewed, *infra*. The claim was also made for classification as structural shapes within the purview of paragraph 312 of said act 19 U.S.C. § 1001, par. 312), as modified.

The statutory definitions above referred to read as follows:

Section 401(a) of the Tariff Act of 1930:

> VESSEL.—The word "vessel" includes every description of water craft or other contrivance used, or capable of being used, as a means of transportation in water, but does not include aircraft.

Section 3, 1 U.S.C.:

> "Vessel" as including all means of water transportation.
>
> The word "vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

The differences in the phraseology of the definitions are insignificant and unimportant here.

Our first inquiry, therefore, is whether said midbodies are "vessels" within the meaning of that word, as judicially interpreted.

A careful review of the evidence and the numerous judicial authorities cited by the parties in their well-prepared briefs leads us to the conclusion that the question posed above must be answered in the affirmative.

The following three witnesses were called at the trial all of whom testified on behalf of the plaintiffs: John D. Frack, vice president in charge of the engineering and estimating

division of the Maryland Shipbuilding & Drydock Co.; Lester Rosenblatt, president and naval architect of the firm of M. Rosenblatt & Son, Inc.; and Ralph A. Leaf, assistant manager of the Baltimore yards of the shipbuilding division of the Bethlehem Steel Company.

These witnesses were exceptionally well informed highly trained experienced experts in the field of naval engineering and architecture. Their testimony was without conflict. It was clear, concise, and convincing.

It appears from the evidence that the midbodies in controversy were constructed in European shipyards in accordance with conventional designs, plans, and specifications prepared by naval architects which conformed to the accepted standards in the construction of watercraft generally and approved by governing bodies, such as the American Bureau of Shipping, the United States Coast Guard, and the United States Public Health Service.

The midbodies were over 500 feet in length and had a cargo capacity of between 12,000 and 14,000 tons. In order to facilitate their transatlantic voyage, they were equipped with a temporary bow and additional stiffeners were used to strengthen the stern. Furthermore, each craft had sleeping accommodations for a crew of eight men, each of whom had signed ships' papers for the crossing. They were equipped with light, heat, power, food, radio facilities, and navigational lights and signals in order to comply with navigational rules of the road and to indicate that the craft were under tow, as required by law for vessels only. (33 U.S.C., sections 144 (c)(i), 145(b), and 145c(a)).

Upon their arrival in this country, the midbodies were suitable for use as vessels of the barge type for commercial use in the transportation of cargo. They were designed for ultimate use as cargo sections of self-propelled ore carriers on the Great Lakes.

The evidence also discloses that each craft carried marine insurance (plaintiffs' exhibit 7) which was secured for protection against damage or loss of the craft in transit and which also served as coverage for the crew of eight who manned the craft while crossing the ocean. In addition to the foregoing, the midbodies were equipped with liferafts, life preservers, anchor and chain, and a generator for light, heat, and messing.

With these considerations in mind, we turn now to *The Conqueror* case, in which the Court thoroughly examined pertinent statutes relating to the administration of customs as early as the Tariff Act of 1789, noting that—

> • • • By the very first act passed by Congress in 1789, subsequent to an act for administering oaths to its own members, a duty was laid upon "goods, wares and merchandise," imported into the United States, in which no mention whatever is made of ships or vessels; but by the next act, entitled "An act imposing duties on tonnage," a duty was imposed "on all ships or vessels entered in the United States" • • •.

Further, the Court observed—

> • • • This distinction between "goods, wares and merchandise," and "ships or vessels," has been maintained ever since, • • •.

The Court was there considering whether the foreign-built yacht, "The Conqueror," owned by an American citizen, was subject to an imposition of customs duties pursuant to the Tariff Act of 1890 upon its arrival in the United States.

In a thorough and well-considered opinion, after reviewing legislation, the Court remarked—

> • • • It is scarcely possible that, if Congress had chosen to impose duties upon such yachts, or had sup-

posed them subject to duty as imported articles, it would have also discriminated against them by requiring them to pay tonnage fees. In this, the latest expression of the legislative will, Congress seems to have recognized the theory, which we have already gathered from the prior course of legislation, that vessels should be treated as a class by themselves, and not within the general scope of the tariff acts.

In view of the elaborate opinion of the District Judge upon this branch of the case it is unnecessary to extend this discussion farther. We think that the liability of ships and vessels to tonnage dues and to light money, except where a certain class of vessels is specially exempted, shows that it was not the intention of Congress to treat them as dutiable articles.
* * *

It having been definitely determined that vessels are not goods, wares, or merchandise, which latter are subject to customs duties, we come to the point where we must decide whether midbodies of the type above described are "vessels," as that term is defined in the statute and as construed by the courts.

In order to support their contention that the midbodies in controversy are vessels, plaintiffs have cited several decisions of this court and other Federal courts which point up the distinguishing marks and characteristics which identify a "vessel."

One of the earlier cases is that of *The International,* 89 Fed. 484 (1898), where a dredge and two scows were held to be vessels and not subject to customs duties. In the opinion of the court, it was unimportant that the dredge was not designed to carry passengers or cargo for hire. As stated by the court—

The fact that dredges and scows are not subject to all the regulations and provisions of law applicable

> to vessels carrying passengers or merchandise for hire and engaged in foreign or domestic commerce, cannot affect their legal status as vessels or render them dutiable. * * *

In *J. G. Hitner* v. *United States,* 21 Treas. Dec. 275, T.D. 31898 (1911), this court, then known as the Board of General Appraisers, was concerned with the question whether the steamship "Altenburg," which traveled self-propelled from Havana to Philadelphia, was subject to customs duties which had been imposed by the collector of customs. In the course of its opinion, the court noted that the vessel appeared—

> * * * to have been properly entered and the usual tonnage and port dues paid. * * *

The craft could not be sold as a vessel because it had been broken up into scrap. Further, the court said—

> * * * That a vessel afloat is not "merchandise" under our tariff law and not an imported article was settled in the case of *The Conqueror* (166 U.S., 110). Duties attach on imported goods according to their condition at the time of their importation. United States v. Irwin, 78 Fed. Rep., 799). The use to which an article will be ultimately put is not to be considered unless a statute so provides, and articles legally brought into the country may not be followed for the purpose of learning their use and with the purpose of assessing a duty in accordance with such use unless the particular provision of the law would require such action. United States v. Wotton (53 Fed. Rep., 344).

The court held that the Altenburg was a vessel at the time it arrived in the United States and, consequently, not subject to customs duties since it was not imported merchandise when it entered the country.

In *Tregoning Boat Co.* v. *United States,* 15 Cust. Ct. 196, C.D. 971 (1945), a so-called boat hull, 17 feet long, 7 to 7½ feet in breadth, and approximately 30 inches deep, arrived at the port of Seattle as cargo on board a steamer. It appears from the opinion of the court—

> * * * In the condition as imported it was equipped with oars and oarlocks, and though provision was made for a mast, none was imported with it. Sails and a rudder, as well as food, water, rope, and signaling equipment, were supplied in the United States. In its completed condition the hull was to be placed aboard a three- or four-thousand-ton vessel to be used as a lifeboat.

Further, the court stated—

> The record shows that in the condition in which it arrived it could accommodate 12 persons and was capable of being used for the purpose of transporting persons over water, including the high seas, and that it had been constructed in accordance with American and Canadian lifeboat laws for that purpose.

The court was also of the opinion that the status of the lifeboat hull as a vessel was not affected by the fact that it was not documented or subjected to tonnage duties, citing *United States* v. *Porto Rico Coal Co.,* 17 CCPA 288, T.D. 43716, and *The International, supra.*

In conclusion, the court observed—

> Under the definition of "vessel" contained in 1 U.S.C. § 3, as construed by the courts, *present and continuous use as a means of transportation on water is not required; capability of practical and substantial use is sufficient.* [Italics supplied.]
>
> The lifeboat in question was, on its arrival in the United States, a "vessel," and not being of the char-

> acter of vessels specifically provided for in the tariff act, was not subject to duty thereunder. * * *

It is true, of course, that not all watercraft legally respond to the statutory definition of "vessel." *Thayer* v. *United States,* 2 Ct. Cust. Appls. 526, T.D. 32252, and *Hitner Sons Co.* v. *United States,* 13 Ct. Cust. Appls. 216, T.D. 41175.

In the *Thayer* case, certain foreign-made racing shells were brought into this country on board the steamship "Cambrian" for the use of the Harvard University crew. The court recognized that these racing shells were not designed for transportation, except for the crew of eight or nine men for the purpose of racing in competition, and that they would not be used for transporting persons or property from one place to another to any substantial extent. In the course of its opinion, the court observed—

> * * * A temporary, fugitive, impractical, although possible, use for transportation of articles or things of trifling weight in smooth water only and for short distances we do not think could possibly answer the call of the statute.

It was, accordingly, held that racing shells were not vessels and were properly classified for duty as a manufacture of wood.

In the *Hitner* case, it appears that the "Niobe," a one-time armored cruiser, had been used for patrol duty in Canadian waters. In 1915, it had been condemned, removed from active service, and dismantled, its guns and ammunition had also been removed. After being severely damaged by an explosion in Halifax Harbor and after unsuccessful attempts had been made to repair the machinery, the Niobe, being then unable to maintain steam or to propel herself, was towed to the port of Philadelphia. The court concluded that, since the Niobe was not engaged in

or suitable for commerce or navigation, or as a means of transportation on water, but was fit only for scrap or junk, it was not a vessel and, therefore, was dutiable as imported merchandise.

Plaintiffs have also drawn our attention to a large number of Federal court decisions arising in admiralty jurisdiction. We deem it entirely proper and appropriate to consider those cases particularly so inasmuch as they deal with the meaning of the word "vessel" in substantially the same statutory context. Many of those cases were cited by our appellate court in the *Hitner* case involving the classification of the Niobe. Without analyzing those cases in detail, a brief summary of them is here set forth:

Disbrow v. *Walsh Brothers,* 36 Fed. 607; *The Wilmington,* 48 Fed. 566; *The Dick Keys,* Fed. Cas. No. 3898; *Ex parte Easton,* 95 U.S. 68. Barges, without power of self-propulsion, were held to be "vessels."

Endner v. *Greco,* 3 Fed. 411; *The General Cass;* Fed. Cas. No. 5307; *In re Eastern Dredging Co.,* 138 Fed. 942. Scows, capable only of moving when towed and used for the transportation of mud and similar substances, were held to be "vessels."

Seabrook v. *Raft,* 40 Fed. 596; *The Annie S. Cooper,* 48 Fed. 703. Rafts of lumber were held to be "vessels."

The Hezekiah Baldwin, Fed. Cas. No. 6449. A floating grain elevator was held to be a "vessel." It appears that the craft had no motive power for self-propulsion and no space for cargo. In the course of its opinion, the court observed—

> * * * By reason of its mode of use it is made subject to the same vicissitudes and perils of the seas, to which all vessels are exposed. She may have collisions, she may require salvage services, and the same necessity for using her credit in order that she may obtain instant repairs * * *.

The Alabama, 19 Fed. 544, Affirmed in 22 Fed. 449; *The Pioneer,* 30 Fed. 206; *Aitcheson* v. *Endless Chain Dredge,* 40 Fed. 253; *The Starbuck,* 61 Fed. 502; *Saylor* v. *Taylor,* 77 Fed. 476; *McRae* v. *Bowers,* 86 Fed. 344; *Bowers* v. *Federal Contracting Co.,* 148 Fed. 290; *Ellis* v. *United States,* 206 U.S. 246. Dredge boats were held to be "vessels."

The Old Natchez, 9 Fed. 476. An old dismantled hull of a river steamboat, being refitted for use as a wharf boat in landing passengers and merchandise, was held to be a "vessel."

The following cases are also cited wherein various types of craft have been held to be "vessels" under admiralty laws:

Petition of Kansas City Bridge Co., 19 F. Supp. 419. A quarterboat serving as a floating and movable boarding and rooming house.

The O'Boyle No. 1, 64 F. Supp. 378, affirmed 155 F. 2d 69. A floating crane.

Ellis v. *United States,* 206 U.S. 246. A barge without motive power of its own.

The Ark; 17 F. 2d 446. A houseboat without motive power.

The Robert W. Parsons, 191 U.S. 17. Canal boats drawn by animal power or taken as a tow by steamers.

Braisted v. *Denton,* 115 Fed. 428. A float used to hold oysters.

The appellate court, in the *Hitner* case, *supra,* dealing with the Niobe, referred to other cases wherein certain unique types of watercraft were held not to be vessels "as not fairly engaged in commerce or navigation": *The Hendrick Hudson,* Fed. Cas. No. 6355. A boat converted into a hotel and saloon by structures erected upon its old hull. *Jones* v. *Coal Barges,* Fed. Cas. No. 7458; *Wood* v. *Two Barges,* 46 Fed. 204. Coal barges, being merely boxes

of rough lumber for floating coals and intended to be broken up at the end of their voyage. *The Big Jim,* 61 Fed. 503, a marine pump, capable of being towed, but set on piles.

In the course of its opinion, the appellate court stated—

> From these authorities some general conclusions may be deduced. In order to come within the definition of a "vessel" as fixed by section 3, Revised Statutes, the service upon which the thing in question can engage must be a maritime service. It must have some relation to commerce or navigation, or at least some connection with a vessel employed in trade. It must be engaged in, or in some sense related to commerce and navigation. The fact that the structure has the shape of a vessel, or has been once used as one, or could by proper appliances be again used as such, can not affect the question. The test is the actual status of the structure as being fairly engaged in or suitable for, commerce or navigation and as a means of transportation on water.

By applying the reasoning of the court in that case and others above cited to the facts applicable to the subject midbodies, we are satisfied that they meet the requirements established by the courts of the term "vessel."

The statutory definition of the word "vessel" has a very wide sweep since it includes *every description of watercraft* or other *contrivance used* or *capable of being used* as a means of transportation on water. That language clearly implies a broad and liberal meaning rather than a restricted one.

Furthermore, the words "used" or "capable of being used" have different connotations and suggest not only present utility but potential utility as a means of transportation on water.

The testimony of Rosenblatt and Leaf tells us that midbodies, in their condition as imported, are well adapted for

use as barges. When asked to give his reasons why in his opinion the midbody, represented by exhibit 1, is commercially usable as a barge, Rosenblatt stated—

> * * * It floats upon water. It is watertight. It can be used to carry cargo just as it is now and could be converted even to carry passengers if need be by a conversion. It is capable of safe navigation upon navigable waters. That leaves me to say that it is and can function as a barge.

When Leaf was asked whether new midbodies similar to exhibit 1 had been used as barges within his experience, he stated—

> On two separate occasions, we had barges arrive at our yard and each barge carried equipment beyond the purpose of the barge and could be considered as cargo, one barge carried from Spain to our yard some grain evacuators, part of the owner's equipment that was in Spain. Another barge was brought to us from Germany and this barge included—carried in its hold some container guides and some rail that was going to be used on another body which was going to be brought over later to one of our yards in the New York harbor. This was certainly cargo in that bunch.

Further, Leaf stated that barges to which he referred were designed to be used as midbodies, of the type illustrated in exhibit 1, and were actually so used.

In *United States* v. *Tug Parris Island et al.*, 215 F. Supp. 144, the Department of Justice brought a libel against a midbody in a proceeding in admiralty. It appears that the midbody was sued in an action *in rem* arising out of a collision with the Coast Guard Cutter Chilula. Libel against the midbody was dismissed after finding that it was not responsible for the damages caused by the collision.

It is clear that "vessels" are beyond the reach of customs duties (*The Conqueror*) unless Congress elects to make them so as in paragraph 370 of the Tariff Act of 1930.

Defendant, in its brief, refers to a number of decisions wherein it was held that certain watercraft were not vessels in the statutory sense. This is not disputed.

As pointed out earlier in this opinion, the appellate court, in the *Hitner* decision, recognized a seeming conflict and cited cases which have been referred to, *supra*. The court, however, followed what we deem to be the great weight of authority in giving a liberal interpretation of the word "vessel."

Defendant's principal line of defense is that the midbodies are "parts" of vessels and, consequently, cannot be treated as vessels within the concept of the statute.

This argument seems to proceed upon the theory that when the midbodies arrived in the United States they were parts of what ultimately became vessels—namely, ore carriers.

Of course, the tariff status of the craft must be determined by their *utility* or *capability for use* at the time of their arrival in the United States.

At that time, they had been towed on their own bottoms several thousand miles across the Atlantic Ocean.

They were seaworthy.

They had been constructed in accordance with designs, plans, and specifications carefully drawn by skilled naval engineers and architects to meet the rigid and accepted standards of navigational requirements.

They were launched in European shipyards as other watercraft would be launched.

They floated and were fully equipped for proper and safe navigation under tow to the United States.

They were capable of transporting cargo if their owners elected to use them for that purpose.

They had the physical appearance of certain watercraft commonly seen in the harbors of our port cities used as barges being towed.

The mere fact that the midbodies were to become the midsections of ore carriers did not destroy their original character as watercraft *capable of being used* as a means of transportation in water.

It is not a *sine qua non* that the purpose for which a watercraft is designed determines whether or not it is a vessel in a legal sense. The statute fixes the test by the words "*used* or *capable of being used* as a means of transportation on water." [Italics supplied.] By the evidence, the subject craft meet that test.

Obviously, actual use for transportation on water is not the only requirement of the statute. Capability for use is an alternative. The etymology of the word "capable" implies potential ability to perform a certain task. It does not require it.

While we have a proper respect for the opinion of the Customs Bureau, as expressed in House Report 1887, which accompanied the bill resulting in Public Law 86-583, to which reference was made in defendant's brief, we do not consider it to be binding upon our course of action.

It seems highly incongruous and unbelievable that Congress could have intended that scows, dredges, barges, elevators, log rafts, houseboats, and old hull converted into a wharf boat, and so many inferior craft should be classified as vessels (as held by the courts) and at the same time have intended that a staunch seagoing craft, possessing the requisite navigational qualifications possessed by these midbodies, should be relegated to the unenumerated catchall provision of paragraph 397 as articles of metal.

We have carefully examined the record and the numerous cases cited by adversary counsel in their briefs and, while there is a diversity of opinion of the meaning of the term "vessel," the overwhelming weight of judicial authority has favored a liberal interpretation and application of the term to a wide variety of watercraft used for many diverse purposes.

In our opinion, the evidence places the contested midbodies within the class of watercraft judicially recognized as "vessels."

Moreover, if the question in issue were to be considered shrouded in doubt, we should be disposed to apply the ancient doctrine that a doubtful question of law, particularly in a customs case, should be resolved in favor of the importer. *Hartranft* v. *Wiegmann,* 121 U.S. 609 (1887); *American Net and Twine Company* v. *Worthington,* 141 U.S. 468 (1891), and cases cited therein.

It is the considered opinion of the court that the subject midbodies are "vessels" within the statutory meaning of that term and, accordingly, should not be subject to customs duties. The claim for classification as structural shapes in paragraph 312 of said act, not having been pressed, is deemed to have been abandoned. Defendant's motion made at the trial to dismiss that claim is, accordingly, granted. Defendant's objections to the receipt in evidence of plaintiffs' exhibits 10 and 11 for identification are sustained.

Judgment will be entered in accordance with the views above expressed.

CHARLES D. LAWRENCE,
J.

Concurring:

RAO,
J.

FORD,
J.

APPENDIX B

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

OCTOBER TERM, 1965

Customs Appeal No. 5199

THE UNITED STATES, *Appellant,*

v.

BETHLEHEM STEEL COMPANY, MARYLAND SHIPBUILDING & DRYDOCK CO., *Appellees.*

August 4, 1966

SMITH, Judge.

This is an appeal by the United States from the judgment of the United States Customs Court, Second Division, sustaining protests concerning two "midbodies" for freighters. The issue is whether these midbodies are subject to the terms of the Tariff Act of 1930, as amended, or whether, because of substantive principles of law, the terms of the Tariff Act are inapplicable.

We shall first consider the nature of the midbodies. Appellees introduced the testimony of three witnesses and various exhibits. The court below summed up the evidence as follows:

> It appears from the evidence that the midbodies in controversy were constructed in European shipyards in accordance with conventional designs, plans, and specifications prepared by naval architects which conformed to the accepted standards in the construction of watercraft generally and approved by governing bodies, such as the American Bureau of Shipping, the United States Coast Guard, and the United States Public Health Service.
>
> The midbodies were over 500 feet in length and had a cargo capacity of between 12,000 and 14,000 tons. In order to facilitate their transatlantic voyage, they were equipped with a temporary bow and additional stiffeners were used to strengthen the stern. Further-

more, each craft had sleeping accommodations for a crew of eight men, each of whom had signed ships' papers for the crossing. They were equipped with light, heat, power, food, radio facilities, and navigational lights and signals in order to comply with navigational rules of the road and to indicate that the craft were under tow, as required by law, for vessels only. (33 U.S.C., sections 144(c)(i), 145(b), and 145c(a)).

Upon their arrival in this country, the midbodies were suitable for use as vessels of the barge type for commercial use in the transporation of cargo. They were designed for ultimate use as cargo sections of self-propelled ore carriers on the Great Lakes.

The evidence also discloses that each craft carried marine insurance (plaintiffs' exhibit 7) which was secured for protection against damage or loss of the craft in transit and which also served as coverage for the crew of eight who manned the craft while crossing the ocean. In addition to the foregoing, the midbodies were equipped with liferafts, life preservers, anchor and chain, and a generator for light, heat, and messing.

Appellees' brief supplies further factual background:[1]

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[1] Counsel's opening statement on behalf of appellees in the trial court is also helpful:

> * * * the article in controversy is known as a midbody. It is the mid-section of a freighter. After the second World War, there were in the United States, a surplus of T-2 and T-3 tankers, a rather standard type vessel, and it was discovered that they could be more efficiently used if their mid-sections were enlarged. There developed a practice or technique of building a larger section by separating the bow and stern sections of the T-2 tanker from its center section and inserting the new mid-section. Some mid-sections were built in the United States; others were built abroad. This case involves two of such midbodies built in Europe, towed across the Atlantic, manned by a crew during the tow, brought into the United States from Holland, all in each instance all on its own bottom. * * *

The evidence related to the midbody owned by Maryland Shipbuilding & Drydock Company[1] established that its design and specifications were prepared by a naval designer and that it was constructed by Verolme United Shipyards of Rotterdam, Holland * * * The construction contract * * * the specifications * * * and the arrangement diagram * * * are of a type of watercraft. * * *

* * *

The midbody was constructed, as are all United States merchant vessels, to meet the requirements of the American Bureau of Shipping * * * the United States Coast Guard * * * and the United States Public Health Service * * * The normal type of marine insurance policies were obtained to cover the vessel while in tow to the United States * * * The midbody was under construction for six months * * * and the transatlantic tow required 44 days * * *.

* * * The vessel was ballasted to achieve a better trim and thus to facilitate its voyage, and had draft marks painted on bow and stern like other vessels * * *.

The midbody had been fitted with a temporary bow, and its stern section had been reinforced with additional steel prior to its voyage * * * The midbody as shown in Exhibit 1 was similar to two barges designed and constructed to carry 14,000 tons of cement, and it could have been used for the same purpose * * *.

* * *

After its arrival in the United States the midbody in Exhibit 1 was delivered to a drydock. A T-3 tanker, originally 501 feet in length, had been cut apart, and

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[1] Bethlehem Steel's midbody was similar. [Footnote by the Customs Court.]

> the old midbody section had been removed. The stern and bow section of the old craft were joined to the new 525 foot midbody to make a self-propelled ore carrier * * *.

The testimony also established that the midbodies were "pretty much completed" and ready for final installation. All bulkheading, tank tops, pipes, electrical work, and ladders and walkways were incorporated in the midbody. Equipment added after the installation included mooring winches, bitts and chocks; and cargo handling gear. The midbodies were not used to transport any cargo but appellant concedes they were capable of handling at least some form of cargo. Appellant did not introduce any evidence nor does it challenge any of appellees' evidence.

We are concerned with the dutiable status of two such midbodies. One was made for appellee Maryland Shipbuilding & Drydock Company in Holland, referred to above, and the other for appellee Bethlehem Steel Company in Germany. Maryland Shipbuilding had contracted to sell the resulting self-propelled ore carrier to Pioneer Steamship Company. The cases were consolidated for trial.

The collector classified the midbodies under par. 397[2] which states:

> Articles or wares not specially provided for, whether partly or wholly manufactured:
>
> * * *
>
> Composed wholly or in chief value of iron, steel * * *
>
> * * *
>
> Other ..... 19% ad val.

[2] Tariff Act of 1930, as modified, 91 Treas. Dec. 150, T.D. 54108.

Both appellees advanced alternate claims in their protests as filed. Each claimed that the midbodies were duty free;[3] or alternatively, that they were a structural shape dutiable under par. 312. This latter claim was deemed abandoned after trial and need not be considered here.

The Customs Court in sustaining the protests found that the midbodies were vessels and not subject to customs duties. The court in its opinion determined that "vessels are not goods, wares, or merchandise, which latter are subject to customs duties," relying on *The Conqueror,* 166 U.S. 110 (1897), and "'vessels' are beyond the reach of customs duties (*The Conqueror*) unless Congress elects to make them so as in paragraph 370 of the Tariff Act of

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[3] The relevant portions of the protests as filed state as follows:

Bethlehem

> We claim that said midbody sections are dutiable as structural shapes, assembled, under Paragraph 312, Tariff Act of 1930, at 7½% ad valorem. Alternatively said sections are not "articles" under 19 U.S.C. Sec. 1001 and therefore, are not described or provided for in the dutiable schedule. Further, said midbody sections were instruments of commerce at the time of entry and therefore were not "articles" under said Sec. 1001. Further, said midbody sections are "vessels" as that term is used in contradistinction to "articles" with respect to said Sec. 1001 and therefore are not subject to duty.

Maryland Shipbuilding

> Such article is a structural shape dutiable under Par. 312 at 7½% ad valorem.
>
> Alternatively it is not merchandise and therefore is not described by Title I Tariff Act of 1930.
>
> Alternatively it is free of duty as part of a vessel.
>
> Alternatively it is a vessel and not dutiable under any provision of the Tariff Act.
>
> We further claim that the assessment of duties made herein is illegal and void. Each of the above claims is made with the proviso and conditionally that the rate or rates claimed are lower than the rate or rates assessed.

Appellees advanced the claim as vessels only.

1930." After reviewing numerous cases interpreting the term "vessel," the court concluded that the midbodies qualified as vessels. The court stated in its opinion:

> Of course, the tariff status of the craft must be determined by their *utility* or *capability for use* at the time of their arrival in the United States.
>
> At that time, they had been towed on their own bottoms several thousand miles across the Atlantic Ocean.
>
> They were seaworthy.
>
> They had been constructed in accordance with designs, plans, and specifications carefully drawn by skilled naval engineers and architects to meet the rigid and accepted standards of navigational requirements.
>
> They were launched in European shipyards as other watercraft would be launched.
>
> They were floated and were fully equipped for proper and safe navigation under tow to the United States.
>
> They were capable of transporting cargo if their owners elected to use them for that purpose.
>
> They had the physical appearance of certain watercraft commonly seen in the harbors of our port cities used as barges being towed.
>
> The mere fact that the midbodies were to become the mid-sections of ore carriers did not destroy their original character as watercraft *capable of being used* as a means of transportation in water.

The parties agree that there is no specific portion of the Tariff Act of 1930 applicable here exempting vessels from duties nor are midbodies included among the articles which are contained on the free list and, as such, expressly ex-

empt from duty.[4] Rather, the duty-free status enjoyed by vessels stems from the Supreme Court's decision in *The Conqueror, supra.* In that case duty had been assessed upon a pleasure yacht. There was no dispute that the pleasure yacht was a vessel and the question before the court, as relevant here, was "whether this vessel was taxable under the tariff laws" 166 U.S. at 113. In its opinion the court set forth extensive comments concerning the relationship of vessels to the tariff laws.[5] While the parties

[4] The briefs indicate that the Tariff Act of 1930, as amended by the Tariff Classification Act of 1962, contains legislation concerning "vessels," "yachts or pleasure boats," and "buoys, beacons, landing stages, cofferdams, rafts, and other floating structures." The parties agree that the terms of this legislation are inapplicable to the midbodies here.

[5] These comments are as follows, 166 U.S. at 114-15:

> Was The Conqueror dutiable under the tariff act of October 1, 1890? 26 Stat. 567. This act requires duties to be levied upon all "articles" imported from foreign countries and mentioned in schedules therein contained, none of which schedules mention ships or vessels *eo nomine.* An abstract furnished us of the corresponding clauses in all the principal tariff acts from 1789 to the present date shows that duties are laid either upon "articles," as in the present act, or upon "goods, wares and merchandise"—words which have a similar meaning. Indeed, the words "articles" and "goods, wares and merchandise" seem to be used indiscriminately, and without any apparent purpose of distinguishing between them. While a vessel is an article of personal property, and may be termed "goods, wares and merchandise," as distinguished from real estate, it is not within either class, as the words are ordinarily used. • • •
>
> Vessels certainly have not been treated as dutiable articles, but rather as the vehicles of such articles, and though foreign built and foreign owned, are never charged with duties when entering our ports, though every article upon them, that is not a part of the vessel or of its equipment or provisions, is subject to duty, unless expressly exempted by law. • • •
>
> Not only is there no mention of vessels, *eo nomine,* in the tariff acts, but there is no general description under which

here emphasize different portions of the above opinion, we are of the view that the following unambiguous statements from *The Conqueror* must be given effect and are controlling here:

> But the decisive objection to the taxability of vessels as imports is found in the fact that, from the foundation of the Government, vessels have been treated as *sui generis*, and subject to an entirely different set of

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they could be included except as manufactures of iron or wood. But it is only by straining the word far beyond its ordinary import, that we are able to apply the word "manufacture" to a seagoing, schooner-rigged, screw steamship, 182½ feet long, nearly 25 feet wide, and of 372 tons burden. The term "manufacture" is as inapplicable to such a vessel as it would be to a block of brick or stone, erected in the heart of a great city. A ship is doubtless constructed of manufactured articles which, if imported separately, would be the subject of duty, but which put together in the form of a ship are taken out of the class of "manufactures," and become a vehicle for the importation of other articles. Considering the hundreds of foreign vessels which enter the ports of the United States every day, it is incredible that, if Congress had intended to include them in the tariff acts, it would not have made mention of them in terms more definite than that of "manufactures."

* * *

We do not undertake to say that the same rule applies to canoes, small boats, launches and other undocumented vessels, which are not used, or are not capable of being used, as a means of transportation on water, as the word "vessel" is defined in Rev. Stat. § 3. While these vessels have a limited capacity for transportation, they are ordinarily used for purposes of pleasure, and are not considered of sufficient importance to require them to be entered at the custom house, or to be entitled to the special protection of the flag. They are treated like other similar vehicles used upon land, and there are reasons for saying that these boats, which do not ordinarily come of themselves into the country, but are imported or brought upon the decks of other vessels, are mere manufactures or other "articles," and are within the description of the tariff acts.

laws and regulations from those applied to imported articles. By the very first act passed by Congress in 1789, subsequent to an act for administering oaths to its own members, a duty was laid upon "goods, wares and merchandise," imported into the United States, in which no mention whatever is made of ships or vessels; but by the next act, entitled "An act imposing duties on tonnage," a duty was imposed "on all ships or vessels entered in the United States" * * * This distinction between "goods, wares and merchandise," and "ships or vessels," has been maintained ever since, although the amount of such duties has been repeatedly and sometimes radically changed. * * * Id. at 118.

* * *

* * * It is scarcely possible that, if Congress had chosen to impose duties upon such yachts, or had supposed them subject to duty as imported articles, it would have also discriminated against them by requiring them to pay tonnage fees. In this, the latest expression of the legislative will, Congress seems to have recognized the theory, which we have already gathered from the prior course of legislation, that vessels should be treated as a class by themselves, and not within the general scope of the tariff acts. Id. at 120.

* * * We think that the liability of ships and vessels to tonnage dues and to light money, except where a certain class of vessels is specially exempted, shows that it was not the intention of Congress to treat them as dutiable articles. * * * Id. at 121.

The parties agree that the Supreme Court in *The Conqueror* did not define the term "vessel" or set forth the characteristics of types of watercraft which may qualify as a vessel.[6] The court below relied on certain statutory

[6] We have noted the court's comments on Rev. Stat. § 3, supra, footnote 5.

definitions of the term "vessel" and its construction by the courts. The statutory definitions are as follows:

1 USC
TITLE 1 GENERAL PROVISIONS
CHAPTER 1—RULES OF CONSTRUCTION
* * *

§ 3. "Vessel" as including all means of water transportation

The word "vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

19 USC
(Tariff Act of 1930)
TITLE 19 CUSTOMS DUTIES
CHAPTER 4—TARIFF ACT OF 1930
SUBTITLE III—ADMINISTRATIVE PROVISIONS
PART I—DEFINITIONS

§ 1401. *Miscellaneous*

When used in this subtitle or in Part I of Subtitle II of this chapter—

Vessel

(a) The word "vessel" includes every description of watercraft or other contrivance used, or capable of being used, as a means of transportation in water, but does not include aircraft.

Representative cases discussed by the lower court concerning 1 USC 3 and the application of the term "vessel" may be briefly noted. In *Hitner-Sons Co.* v. *United States*, 13 Cust. Ct. App. 216, T.D. 41175 (1922), the predecessor to this court after quoting the definition of vessel from what is now 1 USC 3, supra, stated, 13 Cust. Ct. App. at 219:

> The courts of our country have had frequent occasion to discuss and decide what were and were not to be considered "vessels" under this definition. While these decisions are not uniform and are sometimes conflicting, a fairly definite construction can be gathered from them all. * * *

The court in *Hitner* held that a disabled Canadian warship towed into Philadelphia for sale as scrap metal was not a "vessel." The court stated, 13 Cust. Ct. at 221:

> From these authorities some general conclusions may be deduced. In order to come within the definition of a "vessel" as fixed by section 3, Revised Statutes, the service upon which the thing in question can engage must be a maritime service. It must have some relation to commerce or navigation, or at least some connection with a vessel employed in trade. It must be engaged in, or in some sense related to commerce and navigation. The fact that the structure has the shape of a vessel, or has been once used as one, or could by proper appliances be again used as such, can not affect the question. The test is the actual status of the structure as being fairly engaged in or suitable for, commerce or navigation and as a means of transportation on water.
>
> Applying these principles to the facts in the case at bar, it is obvious that the *Niobe* when brought within the customs jurisdiction of the country, was not a "vessel" within the meaning of section 3, Revised Statutes. * * *

In *The International,* 89 F. 484 (3d Cir. 1898), the owner of two scows and a dredge maintained they were vessels under what is now 1 USC 3 and not subject to duty as articles n.s.p.f. The court, in its opinion, reasoned that both the dredge and the scows qualified as vessels, stating, 89 F. at 485:

> * * * While the dredge was not intended or adapted for the carriage of merchandise or passengers, and did not possess the power of self-propulsion except to an inadequate extent through the use of its steam shovel or dipper as a paddle, it was nevertheless a water craft "used, or capable of being used, as a means of transportation on water." Its permanent home was on navigable water, and it was intended and adapted for navigation and transportation by water of its crew, supplies and machinery, from point to point, in carrying on the work of deepening and removing obstructions from channels and harbors in aid of navigation and commerce. * * * The scows also were water craft "used, or capable of being used, as a means of transportation on water." It is immaterial that they were to be laden with mud from the shovel or scoop of the dredge instead of ordinary merchandise. They were designed to receive and transport mud by water in the course of rendering valuable maritime service. Equally with the dredge they were vessels within the meaning of the statute. * * *

In *Thornley & Pitt* v. *United States,* 18 CCPA 265, T.D. 44428 (1930), it was held that two sailing yachts were vessels within the meaning of what is now 1 USC 3 and exempt from duties. The sailing yachts had entered the United States as cargo on the decks of a steamer.

Appellees also direct our attention to a second decision of the Supreme Court, *Norton* v. *Warner Co.,* 321 U.S. 565 (1944). The *Norton* case involved a barge which was moved by towing. The court held that the barge was a vessel under 1 USC 3 as it was "a means of transportation on water." 321 U.S. at 571. Appellees argue, "If that barge was a vessel, then clearly these midbodies * * * must have been vessels at the time of arrival." Its brief states:

> The fundamental fallacy of Appellant's argument on the law in *The Conqueror* case, therefore, is that it

> does not and cannot distinguish these midbodies from *vessels*, as the term is defined in the statute. This weakness is accentuated when the brief * * * refers to these midbodies as "articles". This assumes the very point in issue and ignores the undisputed evidence which establishes that the midbodies have all the characteristics of non-self-propelled vessels and are therefore not "articles" at all. *The Conqueror, supra; The International*, 89 Fed. 484 (3rd Cir. 1898)

It is clear from appellant's brief that it does not, as appellees allege, assume the very point in issue. Appellant's theory is as follows:

> * * * The Conqueror was not held to be non-dutiable because she met the statutory definition of "vessel" which is now contained in 1 U.S.C. 3 and in substance in 19 U.S.C. 1401(a). She was found non-dutiable because the undisputed facts showed that, in bringing her to American waters, her owner was not importing her "in the ordinary sense in which that term is used with reference to other articles" and was not commingling her "with the general mass of property." While the yacht presumably was not engaged in the carriage of cargo, the Court obviously considered that, in these circumstances, she should be given the same status as "vehicles of [dutiable] articles" which, it noted, have never been regarded as dutiable articles in themselves.
>
> * * * Whether capable of being used to transport persons or cargo, the undeniable fact is that, unlike THE CONQUEROR or cargo ships which come to our shores in the sole capacity of transporters of dutiable articles, each midsection was brought to the United States by a shipbuilding concern for a clear domestic commercial purpose: *viz.*, use in the rebuilding of a ship which (at least in the case of the Maryland Shipbuilding and Drydock Company) would then

be sold to a shipping company for anticipated profit * * *. Beyond doubt, the reason for using these foreign built midsections rather than American-made products was the same cost factor which influences most importations.

But whatever the motivation for importing foreign midsections rather than using a domestic equivalent, we do not see how appellees can seriously contend that, as the term was employed in *The Conqueror,* the midsections were not "imported". In the "ordinary sense" of the term to which the Supreme Court referred, the midsections were no less "imported"—i.e., became no less "a subject of sale and commerce" within the United States—than any other materials that might have been brought from abroad for use in the domestic rebuilding of tankers by appellees. In this regard, we think that even appellees would concede the dutiable status of, for example, hardware manufactured in Germany for installation in the rebuilt tankers. The short of the matter is that, analytically, *The Conqueror* precludes any distinction between two types of articles to be employed in ship construction on the ground that one of them may have, as a wholly incidental matter, physical characteristics rendering it capable of floating and carrying objects. * * * Neither the court below nor appellees have suggested any other reasons which would call for the conclusion that, even though not on the free list, Congress necessarily intended that these items of commerce—brought into the United States for use in ship construction in the stead of the products of American industry—were to be non-dutiable. And, we submit, no reasons can be found.

Appellant's theory thus refuses to concede that if we find the "midbodies" are "vessels" then they are automatically exempt from tariff duties. Appellant maintains that the midsections are goods, wares and merchandise

which were brought here for the purposes of sale and use in commerce in place of American-made goods. Appellant relies on the decision in *H. W. Chadbourne* v. *United States,* 27 CCPA 85, T.D. 49625. The issue in *Chadbourne* was whether a yacht was dutiable under par. 370 of the Tariff Act of 1930. Appellant there claimed the yacht had not been "imported" as the yacht had not been brought to New York by its former owner expressly to sell it to *appellant.* In rejecting such an argument, the court stated, 27 CCPA at 87-88:

> * * * we may take judicial notice that ship building is an industry of importance in the United States. Many American workers labor in the production of large ocean-going yachts such as the *Heluis,* from miners, lumbermen and the like, producing raw materials, to designers and skilled artisans who combine the materials into the finished article. If the contention of appellant is correct, it would seem that the purpose of the tariff act "to encourage the industries of the United States" and to "protect American labor" would be thwarted.

Appellant relies on the above quotation as establishing that a complete vessel may, notwithstanding 1 USC 3, be held a dutiable article.

Appellees counter the above argument as follows:

> The distinction between "vessels" and "articles" has continued except that, by the Tariff Act of 1922, Congress made certain yachts and pleasure-boats subject to customs duty. Since 1922 the uniform administrative practice has been in harmony with the *Chadbourne* case and as well, with the rule of *expressio unius est exclusio alterius.* * * * with the exception of yachts and pleasure-boats, which are specifically taxed, all other vessels are exempt from customs duties by virtue of the Supreme Court decision.
>
> * * *

> * * * appellant discusses the *Chadbourne* case, holding that a *yacht* was dutiable under the Tariff Act of 1930. This proves the exception, not the rule. Of course it was dutiable because Paragraph 370 of that act brought a yacht within the definition of "motorboat." Neither *Chadbourne* nor any other case holds that vessels generally are subject to duty, and this is so regardless of their purpose in entering our waters. Those cases that discuss the subject, including *Chadbourne* and *Roberts,* affirm the *Conqueror* rule and hold that vessels, other than yachts and pleasure-boats, are not "articles" within the Tariff Act.
>
> * * *
>
> Appellant did not prove that "vessels" which are brought here to be sold are subject to duty. It proved only that yachts and pleasure-boats are dutiable (and as to them, the purpose of importation is irrelevant). The *Chadbourne* case specifically recognized that, in all other respects, the rule in the *Conqueror* case is still in effect.

Appellees thus concede some vessels under 1 USC 3 are dutiable but only to the extent expressly provided for by statute and all other vessels are duty free.

The disagreement between the parties as to whether structures which may qualify as vessels under 1 USC 3 may also be held dutiable if brought to this country for purposes of sale need not be resolved. If the midsections are not vessels, in view of the applicable substantive principles of law, then accordingly they are not entitled to duty-free status under any theory or authority advanced by appellees. We hold that they are not vessels.

We agree that it is the condition of the structure at the time of importation that controls its classification and not what it is made into after importation. *Leonard Levin Co.* v. *United States,* 27 CCPA 101, 105 C.A.D. 69. And doubt as to the construction of a paragraph of the

Tariff Act should be resolved in favor of the importer, as discussed by the court below, citing *Hartranft* v. *Wiegmann*, 121 U.S. 609 (1887); *American Net & Twine Co.* v. *Worthington*, 141 U.S. 468 (1891); see also *Von Bremen, Asche & Co.* v. *United States*, 12 Ct. Cust. App. 407, T.D. 40585, cited by appellees. We also recognize that, as stated by the lower court,

> * * * while there is a diversity of opinion of the meaning of the term "vessel," the overwhelming weight of judicial authority has favored a liberal interpretation and application of the term to a wide variety of watercraft used for many diverse purposes.

However, we disagree with the legal conclusion advanced by the lower court in its opinion that:

> It seems highly incongruous and unbelievable that Congress could have intended that scows, dredges, barges, elevators, log rafts, houseboats, and old hull converted into a wharf boat, and so many inferior craft should be classified as vessels (as held by the courts) and at the same time have intended that a staunch seagoing craft, possessing the requisite navigational qualifications possessed by these midbodies, should be relegated to the unenumerated catchall provision of paragraph 397 as articles of metal.

While the above statement accurately summarizes the case law, first, the only evidence of Congressional intent of record in regard to vessels and the Tariff Act of 1930 is that cited in *Chadbourne*, supra, which is applicable in all tariff cases and applied to the yacht there: the purpose of the Tariff Act is to encourage industries of the United States and protect American labor. There is no evidence Congress intended, as appellant states, that "any floating object which has the capacity to carry merchandise must be accorded duty-free status." Second, that the midbodies are "staunch seagoing" structures does not establish that they are vessels. Rather, in all the

cases cited, each of the "inferior craft" was capable of and designed to perform a sufficiently related function to "means of transportation" on water to qualify as a vessel. The liberality expressed in the law in interpreting the term "vessel" goes to the very fact that size and structure per se does not determine that a structure is a vessel.

The midbodies, at the time of importation, were not "barges" or equivalent to a barge as appellees would have us hold. They were precisely what the evidence shows, a midsection for a vessel. They were complete in nearly every respect, as pointed out supra. In order to tow them across the ocean they were fitted with temporary, sturdy fore and aft sections.

All of the evidence of record establishes that the midsections, at the time of importation, were not watercraft designed or intended as a means of transportation on water. Their sole resemblance to craft that have been held to be vessels (barges) and their qualification under a literal reading of the definitions advanced as vessels stems from the fact that temporary fore and aft sections were constructed for the tow across the ocean *to make possible their designed and intended use as midsections and not means of transportation.* We find our conclusion that the midbodies are not vessels is consistent with all of the cases discussed below and relied upon by appellees.[7]

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[7] Appellees cite *United States* v. *Tug Parris Island*, 215 F. Supp. 145 (E.D.N.C. 1963) for the proposition that a midbody is a vessel, a position allegedly argued for by the Government and sustained by the court therein. Appellant denies that the Government has adopted the position that a midsection is a vessel; it argues "an action *in rem* may lie against *any* object on the navigable waters so long as it is not in some manner affixed to the land," citing cases. As we read the *Tug Parris Island* case, the court therein held that the owner of the midsection could not be held responsible for the actions of the tug operators who were towing the midsection at the time of the accident. The decision rests on the fact that others were in charge of navigation and not the particular status of the midsection.

Appellees' position is not without merit. We also are aware that the classification determined by the Customs Collector, articles n.s.p.f. assessing duties at 19% ad val., may seem at first blush to be unusual in view of the fact that the midbodies traveled across the Atlantic Ocean, yet, for customs purposes, are not to be regarded as "vessels." However, the fact is that the midbodies made that trip for the exclusive purpose, and were designed and intended for no other reason than to serve as midsections of ore carriers. Thus considered, the midbodies were not vessels at the time of importation, consistent with the Supreme Court mandates we have to guide us in *The Conqueror* and *Norton* cases, supra.

As we find that the midsections are not vessels, they are not entitled to duty-free status.[8] No other claim having been advanced in support of the protest against the classification found by the customs collector, we find the classification of the customs collector to be correct and the decision of the Customs Court is therefore *reversed.*

REVERSED

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[8] Appellant devoted a portion of its brief to an argument which states, in substance, that appellees in this litigation advance a position inconsistent with previous proceedings before the Bureau of Customs. Specifically, appellant argues that appellees sought a determination from the Customs Bureau that constructing or rebuilding an ore carrier in the manner stated in the text, supra, would not amount to a forfeiture of domestic trade rights (see section 27 of the Merchant Marine Act of 1920, as amended (46 USC 883). Appellees, having allegedly succeeded in obtaining a ruling from the Customs Bureau that such an ore carrier would not be "rebuilt outside the United States," appellant argues, is now trying "to have their cake and eat it too." Appellant's theory is that appellees have argued previously that the midbodies are not "vessels" and here argue that they are vessels. Appellees argue against the appellant's position, alleging that they did *not* advance such a position and further, the whole argument is beyond the powers of review of this court. We find it necessary to note the disagreement between the parties only and to state that it has no bearing upon our decision.

APPENDIX C

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

At a session of said court continued and held at the city of Washington, pursuant to adjournment, on this 4th day of August A.D. 1966.

* * * * * *

Customs Appeal No. 5199.

THE UNITED STATES, *Appellant*,

v.

BETHLEHEM STEEL COMPANY, MARYLAND SHIPBUILDING & DRYDOCK CO., *Appellees*.

Said appeal having heretofore been brought on to be heard before the court and due consideration thereon having been had, it is:

ORDERED that the judgment of the United States Customs Court be, and the same is hereby, reversed.*

I, GEORGE E. HUTCHINSON, Clerk of the United States Court of Customs and Patent Appeals, do hereby certify that the above is a true and correct copy of the order made in the above-entitled case on the 4th day of August, A.D. 1966.

Witness my hand and the seal of this court this 14th day of October A.D. 1966.

(Signed) GEORGE E. HUTCHINSON
Clerk.

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* Petition for rehearing denied 10/6-66.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 926

BETHLEHEM STEEL CO., ET AL., PETITIONERS

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The facts of this case are undisputed. Petitioners desired to rebuild ("jumboize") outmoded tankers into large ore carriers by replacing their midsections with larger ones manufactured in European shipyards. Because Section 27 of the Merchant Marine Act of 1920 (41 Stat. 999, as amended, 46 U.S.C. 883) permits only "a vessel built in and documented under the laws of the United States" to engage in the coastwise trade and (until its 1960 amendment, not applicable here) denied the privilege to vessels

"rebuilt outside the United States," [1] one of the petitioners sought a ruling from the Bureau of Customs (in its capacity as administrator of the cabotage laws) that the rebuilt tankers would be eligible to engage in domestic trade. On the basis of its finding that a midsection is not itself a vessel, the Bureau ruled that the jumboized tankers would not be considered "rebuilt outside the United States." [2]

Petitioners subsequently had two midsections manufactured to their specifications in Europe. All of the piping, electrical wiring and apparatus, and ballast tanks required in the center section of a rebuilt

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[1] Section 27 of the Act as then in effect, 46 U.S.C. (1958 edition) 883, provided in pertinent part: "no vessel of more than five hundred gross tons which has acquired the lawful right to engage in the coastwide trade, either by virtue of having been built in or documented under the laws of the United States, and which has later been rebuilt outside the United States, its Territories (not including trust territories), or its possessions shall have the right thereafter to engage in the coastwise trade * * *." In 1960, Section 27 was amended to provide in part: "no vessel of more than five hundred gross tons which has acquired the lawful right to engage in the coastwise trade, by virtue of having been built in or documented under the laws of the United States, and which has later been rebuilt, shall have the right thereafter to engage in the coastwise trade, *unless the entire rebuilding, including the construction of any major components of the hull or superstructure of the vessel, is effected within the United States,* its Territories (not including trust territories), or its possessions * * *." 74 Stat. 321, 46 U.S.C. 883 (emphasis added).

[2] The ruling of the Bureau of Customs is not formally reported. It is, however, published in the House Committee report on the 1960 amendment to 46 U.S.C. 883. H. Rep. No. 1887, 86th Cong., 2d Sess., pp. 2-3.

tanker were incorporated in the midsections. The midbodies were then towed to the United States where petitioners used them to jumboize two tankers.[3] The rebuilt vessels were sold for use as self-propelled ore carriers on the Great Lakes and documented as vessels entitled to engage in the coastwise trade.

Upon entry of the midbodies into the United States, the Collector of Customs levied duty on them under Paragraph 397 of the Tariff Act of 1930, 19 U.S.C. (1958 edition) 1001, Para. 397, as modified by the Torquay Protocol to the General Agreement on Tariffs and Trade, 91 Treas. Dec. 150, T.D. 54108.[4] Petitioners protested, claiming the midsections were vessels and, as such, were, under the decision in *The Conqueror*, 166 U.S. 110, subject to no duty. The Customs Court sustained the protest, holding that the midbodies were vessels within the general definitions of the word contained in 1 U.S.C. 3 and 19 U.S.C. 1401(a),[5] and were therefore duty-free under *The Conqueror*.

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[3] To enable the midbodies to be towed across the Atlantic, temporary bows were affixed to the forward ends of their hulls and their sterns were reinforced.

[4] Paragraph 397 encompasses "[a]rticles or wares not specially provided for, whether partly or wholly manufactured * * * [c]omposed wholly or in chief value of iron, steel, * * * [etc.]."

[5] 1 U.S.C. 3, which is virtually identical to 19 U.S.C. 1401 (a), provides: "The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. 3 is a general definition, not intended to be specifically applicable in the customs field. 19 U.S.C. 1401(a) is a defi-

The Court of Customs and Patent Appeals reversed, holding that the midbodies were not vessels and that duty was properly assessed (Pet. App. B). The court found (Pet. App. 33a):

> All of the evidence of record establishes that the midsections, at the time of importation, were not watercraft designed or intended as a means of transportation on water. Their sole resemblance to craft that have been held to be vessels (barges) and their qualification under a literal reading of the definitions advanced as vessels stems from the fact that temporary fore and aft sections were constructed for the tow across the ocean *to make possible their designed and intended use as midsections and not means of transportation.* [Emphasis in original.]

The decision below is clearly correct, is not in conflict with the decision of any other court, and has little (if any) prospective importance. Further review, therefore, is unwarranted.

1. It is uncontradicted that the midbodies were constructed not as barges or any other type of watercraft but solely as the center sections of tankers. Affixing temporary bows and placing stiffening at their sterns to make possible their being towed across the ocean did not convert them into vessels. That a midbody might be, in the words of 1 U.S.C. 3, "used, or capable of being used, as a means of transportation on water" is not controlling as to whether it is a vessel for customs purposes. Many objects that are

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nition for use in conjunction with a portion of the customs laws that is not involved in this case.

literally within the definition are plainly not "vessels." For example, a large wooden watertight packing crate would be "capable of being used as a means of transportation on water," but no one, we believe, would suggest it be accorded duty-free entry as a vessel.[6]

2. Even were the midbodies "vessels" they would be subject to customs duty.[7] Congress has not provided that *any* object which meets some definition of the word vessel must be accorded duty-free entry. The leading case on the exemption of vessels from duty—*The Conqueror*, 166 U.S. 110—certainly did not attribute to Congress a purpose to exempt from duties all objects that float and are physically capable of transporting persons or cargo. In holding the yacht in that case entitled to duty-free entry the Court cited three factors: *first*, vessels traditionally

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[6] Petitioners' suggestion of a conflict (Pet. 8, 11) between the decision below and the decisions in *The International*, 89 Fed. 484 (C.A. 3), *Thornley & Pitt* v. *United States*, 18 C.C.P.A. (Customs) 265, and *Hitner Sons Co.* v. *United States*, 13 Ct. Cust. App. 216, is without merit. The dredge and scows in *The International* and the yachts in *Thornley & Pitt* were plainly vessels within the traditional meaning of the word, and were intended to be used as vessels; in *Hitner Sons* the court held *dutiable* the ruins of a vessel shown to be fit only for scrap or junk. Petitioners' further suggestion that the decision below is in conflict with a number of decisions outside the customs field (Pet. 9-11) is wide of the mark. The decision that midsections are not vessels for customs purposes is entirely consistent with cases holding a variety of floating objects to be vessels within the meaning of other statutes having wholly different purposes.

[7] Because of its finding that the midbodies were not vessels, the court below did not reach this point.

are not "imported or taken into the country in the ordinary sense in which that term is used with reference to other articles" since they do not "become commingled with the general mass of property" (*id.*, at 115); *second*, vessels are not brought to the United States to "become the subject of sale and commerce within the country" but rather come to our shores as the vehicles of dutiable articles which become the subject of sale and commerce (*ibid.*); and *third*, from the beginning of the Republic, Congress had by statute subjected "all ships or vessels entered in the United States" to tonnage duties but had made no mention of "ships or vessels" in the tariff laws (*id.*, at 118). None of these factors is applicable to the present case.

Petitioners' sole purpose in bringing the midbodies to the United States was to use them in place of American-made midbodies in rebuilding vessels for sale here. The midbodies thus were "commingled with the general mass of property" and were "the subject of sale and commerce" here. Moreover, the midbodies were not subjected to tonnage duties upon their arrival in the United States. Whether *capable* of being used to transport persons or cargo, the fact is that unlike THE CONQUEROR or cargo ships which come to our shores in the sole capacity of transporters of dutiable articles each midsection was brought to the United States by a shipbuilding concern for a clear domestic commercial purpose—use in rebuilding a ship for sale to a shipping company at an anticipated profit. Doubtless the reason for using these foreign-built midsections rather than American-

made products was to obtain cost savings—the factor that influences most importations. In these circumstances, it could not have been the congressional intent that midbodies (even if they were to be deemed "vessels"), utilized in the domestic shipbuilding industry in lieu of American-made products, be free of duty.

3. To accord the midbodies duty-free status would frustrate a considered policy of the Bureau of Customs, the government agency charged with administering the nation's cabotage laws. As mentioned (*supra*, p. 2), at the request of one of the petitioners the Bureau ruled that vessels rebuilt with foreign-made midsections would not lose their privilege to engage in the coastwise trade. That decision was primarily influenced by the Bureau's finding that a midbody could not itself be considered a vessel because it was not intended to be used as one. Petitioners have reaped the benefits of the Bureau of Customs' ruling by selling the rebuilt tankers as vessels entitled to engage in the coastwise trade; they should not now be permitted to avoid the corollary—that the midsections are subject to duty under the Tariff Act of 1930.

4. The question whether midbodies are dutiable under the Tariff Act has little prospective importance. Since the 1960 amendment to Section 27 of the Merchant Marine Act (see p. 2, n. 1, *supra*), vessels rebuilt with foreign-made midsections may not engage in the coastwise trade. Thus the major factor which influenced the importation of foreign mid-

sections to our shores—to rebuild tankers at a lower cost but not to lose the vessels' coastwise trade privileges—no longer exists. Petitioners' suggestion (Pet. 14) that midbodies may nevertheless still be imported is wholly unrealistic. Petitioners rebuilt their tankers in the United States only to avoid losing the vessels' coastwise trade privileges; the cost of jumboizing a vessel in an American shipyard with a foreign-made midbody would undoubtedly far exceed the cost of sailing the vessel to a foreign shipyard and rebuilding it there. Morever, while an American flag vessel rebuilt with a foreign midsection would still be entitled to engage in foreign trade, it would almost certainly not receive the subsidies which make it profitable to operate a merchant vessel under the United States flag or to rebuild such a vessel.[8]

Furthermore, the Tariff Schedules of the United States, in effect since August 31, 1963, contain a specific provision assessing duty on "floating structures."[9] The Bureau of Customs has ruled that midsections are dutiable under that provision.

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[8] While operating and reconstruction subsidies are not *per se* denied vessels rebuilt outside the United States, the statutes governing the award of those subsidies require that "so far as practicable" (in the case of reconstruction subsidies) or "whenever practicable" (in the case of operating subsidies) only articles, materials, and supplies grown, produced, or manufactured in the United States shall be used in the subsidized vessels. 46 U.S.C. 1155(a), 1176(7). Since only limited funds are available for these subsidies, it is highly doubtful they would be paid to a shipowner who rebuilt his vessel using a foreign-made midsection.

[9] See Tariff Schedules of the United States, 19 U.S.C. 1202, Item 696.60.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1967.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 926

BETHLEHEM STEEL COMPANY, ET AL., *Petitioners*,

v.

UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Customs and Patent Appeals

---

PETITIONER'S REPLY BRIEF

The respondent's memorandum is as notable for what it does not do as for what it does.

1. Respondent does not quarrel and is not "dissatisfied with [the] presentation" by petitioner of the question presented. Pet. 2; see Rules 40(3) and 24(1). The essence of the question presented is that "the midbodies met all factual, statutory, and established judicial tests as to what constitutes a vessel." Pet. 2.

We are not here dealing with respondent's imagined "large wooden watertight packing crate" (Resp. Memo. 5) any more than we are with the wooden shoe in which Wynken, Blynken, and Nod sailed (see Eugene Field, *A Dutch Lullaby*), but with large (500 feet long), ocean-going vessels, having cargo capacity of over 12,000 tons, carrying and housing crews of eight. Pet. 4-5. Indeed, we are dealing with vessels within what respondent calls "the traditional meaning of the word" (Resp. Memo. 5), and in the same sense that "The dredge and scows in *The International* [89 Fed. 484 (C.A. 3)] and the yachts in *Thornley & Pitt* [18 C.C.P.A. (Customs) 265] were plainly vessels." Resp. Memo. 5.

2. In saying that it was correct for the court below to hold the midbodies subject to duty because it was petitioners' design and intention to use them, after arrival in this country, as mid-sections of ore carriers, respondent has not met, or even attempted to meet, the argument of the petition (Pet. 8) that looking to the future, as the court below did, to determine whether something brought into this country is subject to customs duty directly conflicts with the rule of the decided cases that *the tariff status of an article is governed by its condition at the time of arrival in the United States,* not by what might be done with the article after arrival. *United States* v. *Schoverling,* 146 U.S. 76; *Worthington* v. *Robbins,* 139 U.S. 337; *Leonard Levin Co.* v. *United States,* 27 C.C.P.A. 101, 105 C.A.D. 69; *The Altenburg,* 21 Treas. Dec. 275, T.D. 31898 (Bd. of Genl. Appraisers, 1911).

3. Respondent refers (Memo. 2, 7) to a ruling of the Bureau of Customs, made in its capacity as administrator of the cabotage laws, that the rebuilt tank-

ers were eligible to engage in domestic trade, in the course of which the Bureau said that a midbody is not a vessel. This ruling, pertaining solely to a documentation matter, is not before the Court, nor was it before the court below, or before the Customs Court. In any event, the question of documentation, or lack of it, is irrelevant to whether a floating structure is a vessel (*Hercules Co.* v. *The Brigadier General Absolom Baird,* 214 F. 2d 66 (C.A. 3); *Scudero* v. *Todd Shipyards Corp.,* 63 Wash. 2d 46, 385 P.2d 551) or is subject to customs duty. *United States* v. *Porto Rico Coal Co.,* 17 C.C.P.A. (Customs) 288.

If the thrust of respondent's argument is that petitioners are being inconsistent (it was one of the petitioners who sought the documentation ruling), petitioners would point out that there is no such inconsistency as the petitioner's ruling request did not seek a determination of whether the midbody was a vessel. On the contrary, it is the Government that has been inconsistent. Here the Government claims midbodies are not vessels, but in *United States* v. *Tug Parris Island,* 215 F. Supp. 144 (E.D.N.C.), the United States brought an action in admiralty against a T-2 tanker midbody for damage it had inflicted while under tow in collision with the Coast Guard cutter Chilula, and in opposing a motion to dismiss the libel *in rem* against the midbody, the Government's memorandum argued:

> "The gravamen of the Government's action is that the Chilula was * * * struck by a moving vessel [*i.e., the midbody*], which is *prima facie* at fault. * * * The tanker section [*the midbody*] as the instrument of the collision, the only vessel which came in contact with the Coast Guard Chilula, is under a burden to show that she is free of fault * * *."

An even more glaring instance of the Government's inconsistency is found in *In Re United States Air Force Texas Tower No. 4*, 203 F. Supp. 215 (S.D.N.Y.). The Texas Tower was a large radar tower installation off the North Atlantic Coast of the United States that stood in 185 feet of water on three steel legs, each of which was 12½ feet in diameter and was permanently embedded in the ocean floor by means of solid concrete caissons 25 feet wide and 20 feet deep. Following collapse of the Tower in a North Atlantic storm, resulting in the death of 28 persons, the Government petitioned the court for limitation of liability, under 46 U.S.C. 183 (R.S. § 4283, as amended), on the ground that the Tower was a vessel. Now, to avoid a refund of customs duties, the Government claims that midbodies that cross the Atlantic on their own bottoms with their own crews and are fully capable of carrying substantial commercial cargo are not vessels.

4. Respondent asserts (Memo. 7-8) that the question presented "has little prospective importance" and that petitioners are "unrealistic" in indicating (Pet. 14) that there is a continuing interest in bringing foreign-built midbodies to the United States. Respondent's assertions are wholly unfounded in fact. The facts are that United States ships rebuilt in the United States with foreign midbodies have been ruled to be eligible to share in the carriage of the 50 per cent of government-financed cargoes reserved to privately owned United States-flag commercial vessels, in accordance with 46 U.S.C. 1241(b) (section 901(b) of the Merchant Marine Act, 1936, as amended by Act of Sept. 21, 1961, Pub. L. 87-266, 75 Stat. 565). Indeed, when the 1961 amendment to the Merchant Marine Act, 1936, was before Congress, the Department of Commerce

recommended favorable consideration and stated its interpretation of the bill to be that "any ship that is rebuilt in the United States with a foreign built midbody" would not be excluded from the definition of eligible privately owned United States-flag commercial vessels. H. Rept. 922, 87th Cong., 1st sess., p. 4. Moreover, such ships are also eligible to carry military cargo in accordance with 10 U.S.C. 2631 (Act of Aug. 10, 1956, c. 1041, 70A Stat. 146). And midbodies are still being brought to our shores for these purposes. See, e.g., Hearings, Subcommittee on Merchant Marine, House Committee on Merchant Marine and Fisheries, 89th Cong., 2d sess., June 20, 1966, p. 54. The importance of this to the life and health of the shipping industry should not be underestimated.

For the foregoing reasons and those stated in the petition, a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 926

BETHLEHEM STEEL COMPANY, ET AL., *Petitioners,*

v.

UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Customs and Patent Appeals

PETITION FOR REHEARING

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No. 926

BETHLEHEM STEEL COMPANY, ET AL., *Petitioners,*

v.

UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Customs and Patent Appeals

PETITION FOR REHEARING

Bethlehem Steel Company and Maryland Shipbuilding & Drydock Company pray that this Court grant rehearing of its order of February 13, 1967, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the United States Court of Customs and Patent Appeals in the above-entitled case as prayed for in the petition filed December 30, 1966, herein.

Reasons for Granting Rehearing and Issuing the Writ

1. Three days before this Court entered its order on February 13 denying certiorari, the United States Court of Appeals for the Fourth Circuit decided a case with which the decision below comes into direct con-

flict. *United States* v. *Moran Towing & Transportation Company, Inc., et al.,* Nos. 9867, 9868, decided Feb. 10, 1967. A copy of the Fourth Circuit's opinions in the *Moran* case is appended hereto.

The question presented in the petition for writ of certiorari (Pet. 2), with which respondent does not quarrel (see Pet. Reply Br. 1), is whether the court below was correct in holding that petitioners' mid-bodies were not vessels.

In the *Moran* case the United States, consistently with its position and with the decision below in the instant case, had argued that a floating drydock was not a "vessel" or "other craft" within the meaning of the Wreck Act, Act of Mar. 3, 1899, c. 425 §§ 15, 16, 19, and 20, 33 U.S.C. 409, 411, 412, 414, and 415. The Court of Appeals for the Fourth Circuit unanimously decided this question adversely to the United States.[1]

In reaching its decision, the Court of Appeals adverted to the statutory definition of a vessel found in 1 U.S.C. 3 (*infra,* App. 12), reviewed a number of cases in which various "strange craft" had been held to be vessels (*infra,* App. 12), and went on to say (*infra,* App. 12-13):

> "* * * the definition [of vessel] is held to extend to relatively permanent or stationary structures which are in no sense, when serving their primary function, engaged in transportation. *Their capability,* though more theoretical than practical, *brings them within the definition.*

[1] Judge Sobeloff, although dissenting, specifically agreed with the court's majority that the drydock was a vessel, saying:

> "The definition of a 'vessel' is, as the majority points out, sufficiently broad to encompass the dock." (*Infra,* App. 26-27)

> "This floating dry dock was as *capable of use* as a means of transportation on water as other specialized craft which have been held to be vessels. During much of the voyage we have described, it had a crewman aboard. It carried portable pumps and navigation lights. It was not designed to carry cargo, but it had been regularly employed in lifting and supporting ocean going vessels, and there is no reason to suppose that, if occasion arose, it could not have been used, under tow, for the movement of objects from one place to another." (Emphasis supplied)

By these tests, petitioners' midbodies were vessels *a fortiori.* Pet. 4-5. Even more than the drydock's, the midbodies' capability of use as a means of water transportation brought them within the statutory definition of vessel (1 U.S.C. 3), in addition to which the midbodies were actually used as such means of transportation. The Fourth Circuit carefully considered (*infra,* App. 13-15) the contrary decision of the Court of Customs and Patent Appeals in the instant case and found it not persuasive, saying that petitioners' midbodies would clearly have been vessels within the meaning of the Wreck Act. It follows that the midbodies were vessels for the purpose of determining whether they were subject to duty, for it is the same definition that governs what is a vessel under the Wreck Act and what is a vessel under the customs laws.

Although the Fourth Circuit sought to reconcile its *Moran* decision with that of the court below in the instant case, on the ground that the Court of Customs and Patent Appeals "was concerned with the protection of American industry, shipyards and employees" (*infra,* App. 15), a ground which, as we pointed out in our petition for writ of certiorari (Pet. 12-13), is

appropriate for congressional rather than judicial consideration, there can be no question, reading as a whole the pertinent portions of the Fourth Circuit's opinion (*infra,* App. 11-15), that the decision of the Court of Customs and Patent Appeals, of which review is here sought, directly conflicts with this latest word from the Fourth Circuit as to what is a vessel.

2. This question continues to be of vital importance to the shipping industry (Pet. 13-14; Pet. Reply Br. 4-5). Indeed, this latest Fourth Circuit decision also illustrates how live and important are the questions of what constitutes a vessel and of the meaning of the statutory definition, 1 U.S.C. 3. These call for resolution by this Court.

CONCLUSION

For the reasons set forth above, in the petition for writ of certiorari, and in petitioners' reply brief, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the United States Court of Customs and Patent Appeals.

Respectfully submitted,

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Certificate of Counsel

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and I do further certify that said petition is restricted to grounds which are confined to intervening circumstances of substantial effect.

March 10, 1967.

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 9867.

United States of America,
Appellee,
versus

Moran Towing & Transportation
Company, Incorporated,
Appellant.

No. 9868.

United States of America,
Appellee,
versus

Bethlehem Steel Company,
Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE. ROSZEL C. THOMSEN, DISTRICT JUDGE.

(Argued May 5, 1965. Decided February 10, 1967.)

Before HAYNSWORTH, Chief Judge, and SOBELOFF and BOREMAN, Circuit Judges.

David R. Owen (William R. Dorsey, III, and Semmes, Bowen & Semmes on brief) for Appellant in No. 9868, and Southgate L. Morison (Ober, Williams & Grimes on brief) for Appellant in No. 9867, and Martin Jacobs, Attorney, Department of Justice, (John W. Douglas, Assistant Attorney General, and Alan S. Rosenthal, Attorney, Department of Justice, on brief) for Appellee.

HAYNSWORTH, Chief Judge:

The controversy involves the duty and financial burden of removal of the broken hulk of what once was a floating dry dock. The United States contends that the financial burden rests upon Bethlehem Steel Company, the owner, and Moran Towing & Transportation Company, Incorporated, whose tugs had the dock in tow, because, under the relevant statutes, the dry dock was not a vessel or craft, and, even if it was, that the burden is cast upon the owner and the tug owner, because the dry dock was intentionally grounded, as the District Court found, or, at least, the grounding occurred as a result of negligence. The defendants, on the other hand, contend that the floating dry dock was a vessel or craft within the meaning of the relevant statutes, that the grounding was not intentional or even the result of negligence, but, that if there were fault on their part, the owner's abandonment casts the duty and financial burden of removal upon the United States, except insofar as it could reimburse itself from the salvage.

The District Court held for the United States upon the ground that the floating dry dock was neither a vessel nor a craft, and, alternatively, that, if it was, the grounding was intentional. On appeal the United States urges as additional support that even if not intentional the grounding was negligent and this defeats the owner's right of

abandonment. We conclude that the judgment cannot be supported on either ground or upon the alternative supporting ground advanced on appeal by the United States.

The floating dry dock was of wooden construction. It was composed of six trussed sections numbered 1, 2, 3, 4, 5 and 7.[1] It had an overall length of 360 feet, a width of 100 feet, and it was 45 feet high. It had a capacity of 9400 tons.

Bethlehem had purchased the dock in 1930, at which time it was approximately ten years old. It was then towed section by section from Charleston, South Carolina to Bethlehem's Key Highway Yard in Baltimore, Maryland, where it was in substantially continuous use as a floating dry dock through October 4, 1962, only thirteen days before the tow commenced which resulted in its wreckage.

Earlier, Bethlehem had decided to dispose of the dry dock, which was then, apparently, in good condition and regular use. Bethlehem had closed some of its yards in New York Harbor and had decided to replace the 9400-ton floating dry dock with another of larger capacity made surplus by the New York closings. The replacement dock was one of 20,000-ton capacity. That decision made, Bethlehem then turned to the disposition of the 9400-ton dock.

Bethlehem considered beaching the dry dock and burning it, but the landowners it contacted were unwilling to have their properties used for such a purpose. An inquiry was addressed to the Maryland Port Authority which declined to suggest approval of a sinking anywhere in Chesapeake Bay, but, after suggesting the possibility of beaching and burning it,[2] mentioned that it might be sunk at

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[1] At an earlier time there had been a seventh section numbered six in between sections 5 and 7.

[2] Beaching and burning, it thought unobjectionable, provided the total hulk was burned, that is its underwater as well as its above water portions. This seemed impractical.

sea. Bethlehem then contacted the Army Engineers, from whom they learned that the engineers had no rules prohibiting the scuttling of the dry dock at sea at or beyond the thousand fathom curve, and that, if sunk there, the Navy had no interest and the Coast Guard no jurisdiction.

Bethlehem then decided to have the dry dock towed out to sea and sunk beyond the thousand fathom curve. It entered into a contract with Moran Towing & Transportation Company, Incorporated to take it to sea.

On October 17, 1962, only thirteen days after the last day on which the dock had been in use, two of Moran's tugs took it under tow. They departed Bethlehem's Key Highway Yard at approximately 6:45 P.M., and, twenty minutes after midnight, the flotilla hove to near Chesapeake Bay Bridge to await further information about a storm reported off the Carolina Coast. The weather was good, the sea calm, and the tide was only three quarters of a knot. The flotilla steamed into the tide at three-quarters of a knot, so that it had no motion over the ground.

At 5:30 o'clock on the morning of October 18 the dock was riding well and normally, but at 5:45 there was an obvious list at the forward port corner of the forward section, that being No. 7. The foremost port compartment of the No. 7 pontoon was found to be filling rapidly. Pumps, provided for that purpose, were placed in operation in No. 5 pontoon, but it, too, began to fill about 7:00 o'clock. Meanwhile, the Captain of the flotilla decided that prudence required a return to the Key Highway Yard. He shifted the lead tug to the after end of the dock, and at 6:50 o'clock in the morning began a return trip up the Bay. This placed the pontoon sections which were taking on water at the starboard after end of the return movement of the flotilla.

In Brewerton Channel, an entrance to Baltimore Harbor,

the after starboard end of the dry dock began to hit bottom. By this time representatives of Bethlehem, who had been notified, had come out to meet the flotilla and were present. After radio-telephone consultation with another Bethlehem official at Key Highway Yard, which is in the inner harbor, it was decided to turn out of the channel toward Bethlehem's Sparrows Point steel plant. It then appeared most unlikely that the sinking dry dock could be successfully towed to the Key Highway Yard, and Sparrows Point, at the entrance to Baltimore Harbor, was immediately at hand.

The dry dock finally grounded in 21 feet of water off Sparrows Point some 250 yards north of Brewerton Channel, but well short of land controlled by Bethlehem. The tugs could move it no farther.

Though the wreck did not menace traffic in any dredged channel, it was in waters of Baltimore Harbor which are technically navigable and readily usable by vessels of shallow draft and small craft. The United States regarded the wreck as a menace to navigation and sought its removal. It declined to accept its abandonment, which Bethlehem tendered shortly after the foundering.

Since the oral argument, the Court has been informed that the dry dock has been removed by the United States at a cost of $163,000.

It may be helpful at the outset to take a brief general look at the relevant statutes, all of which are derived from the Rivers and Harbors Act of 1899.

Title 33 U.S.C.A. § 401, derived from § 9 of the Rivers and Harbors Act of 1899, prohibits the construction of bridges, dams, dikes and causeways in or over navigable waters without prior approval of the Chief of Engineers and the Secretary of the Army.

33 U.S.C.A. § 403, derived from § 10 of the Act, the full text of which is set forth in the margin,[3] prohibits the creation of any obstruction to the navigable capacity of waters of the United States unless authorized by the Congress. The section declares that the building or the commencement of the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, or jetty shall not be lawful unless done pursuant to plans recommended by the Chief of Engineers and authorized by the Secretary of the Army. It also declares it shall not be lawful to excavate, fill or alter the course, condition or capacity of any port or similarly enclosed waters or of a canal or the channel of any navigable waters of the United States, unless the work has been authorized by the Secretary of the Army upon the recommendation of the Chief of Engineers.

Section 404, derived from § 11 of the Act, authorizes the Secretary of the Army to establish harbor lines and prohibits the extension of piers, wharves, bulkheads, or other works or deposits beyond the harbor lines, except pursuant to regulations prescribed by the Secretary of the Army.

Section 406, derived from § 12 of the Act, provides a penalty for the wrongful construction of bridges, piers and

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[3] "The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same."

similar structures and provides for their removal. It declares any violation of §§ 401, 403 or 404 shall be a misdemeanor and specifically authorizes district courts to issue injunctions requiring the removal of any structure, or part of a structure, erected in violation of those sections.

Section 409 of Title 33, which was § 15 of the Act, the text of which is set forth in full in the margin,[4] relates to the obstruction of navigable waters by vessels or other craft. It provides that the anchorage of vessels or other craft in a navigable channel in such a way as to hinder the passage of other vessels or craft is unlawful. It also makes it unlawful voluntarily or carelessly to sink or permit the sinking of a vessel or other craft in a navigable channel or to float loose logs or sack rafts in streams used by steamboats in such a manner as to obstruct the navigation of vessels. It then provides that whenever a vessel, a raft, or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, the owner must immediately mark the wreck and promptly commence its removal. Failure to commence the immediate removal of the wreck shall be

[4] "It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft; or to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels; or to float loose timber and logs, or to float what is known as 'sack rafts of timber and logs' in streams or channels actually navigated by steamboats in such manner as to obstruct, impede, or endanger navigation. And whenever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do shall be unlawful; and it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as provided for in sections 411-416, 418, and 502 of this title."

considered an abandonment and subject the craft to removal by the United States.

Section 411, derived from a portion of § 16 of the Act, provides that any violation of § 409, or certain other sections with which we are not now concerned, shall be a misdemeanor. A violator is subject to a fine of not less than $500 nor more than $2500. In what is now § 412 of Title 33, § 16 of the Act further provided that any willful obstruction of the channel of any waterway in the manner contemplated in § 409 by any master, pilot or engineer shall also constitute a violation of other sections of the Act, including § 403, and shall result in the revocation or suspension of his license.

Sections 414 and 415, which were respectively, §§ 19 and 20 of the Act[5] authorize removal by the United States

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[5] Section 19, 33 U.S.C.A. § 414 provides:

"Whenever the navigation of any river lake, harbor, sound, bay, canal, or other navigable waters of the United States shall be obstructed or endangered by any sunken vessel, boat, water craft, raft, or other similar obstruction, and such obstruction has existed for a longer period than thirty days, or whenever the abandonment of such obstruction can be legally established in a less space of time the sunken vessel, boat, water craft, raft, or other obstruction shall be subject to be broken up, removed, sold, or otherwise disposed of by the Secretary of the Army at his discretion, without liability for any damage to the owners of the same: *Provided*, That in his discretion, the Secretary of the Army may cause reasonable notice of such obstruction of not less than thirty days, unless the legal abandonment of the obstruction can be established in a less time, to be given by publication, addressed 'To whom it may concern,' in a newspaper published nearest to the locality of the obstruction, requiring the removal thereof: *And provided also*, That the Secretary of the Army may, in his discretion, at or after the time of giving such notice, cause sealed proposals to be solicited by public advertisement giving reasonable notice of not less than ten days, for the removal of such obstruction as soon as possible after the expiration of the above specified thirty days' notice, in case it has not in the meantime been so removed, these proposals and contracts, at his discretion, to be conditioned that such vessel, boat, water craft, raft, or other obstruction, and all cargo and property contained therein, shall become the property of the contractor, and the contract shall be awarded to the bidder making the proposition most advantageous to the United States: *Provided further*, That any money received from the sale of any such wreck,

of sunken craft which have been abandoned or which create an emergency condition. Section 414 provides that when navigable waters of the United States are "obstructed or endangered" by "any sunken vessel, boat, water craft, raft, or other similar obstruction," the craft, if abandoned, shall be subject to removal or other disposition by the Secretary of the Army without liability for any damage to the owners. The Secretary may, in his discretion, so condition contracts for removal that the craft and cargo so removed shall become property of the contractor. The section also provides that any money realized by the United States from the sale or removal shall go into the treasury. Section 415 gives the Secretary authority under emergency to summarily remove a sunken vessel obstructing navigation be-

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or from any contractor for the removal of wrecks, under this paragraph shall be covered into the Treasury of the United States."

Section 20, 33 U.S.C.A. § 415 provides.

"Under emergency, in the case of any vessel, boat, water craft, or raft, or other similar obstruction, sinking or grounding, or being unnecessarily delayed in any Government canal or lock, or in any navigable waters mentioned in section 414 of this title, in such manner as to stop, seriously interfere with, or specially endanger navigation, in the opinion of the Secretary of the Army, or any agent of the United States to whom the Secretary may delegate proper authority, the Secretary of the Army or any such agent shall have the right to take immediate possession of such boat, vessel, or other water craft, or raft, so far as to remove or to destroy it and to clear immediately the canal, lock, or navigable waters aforesaid of the obstruction thereby caused, using his best judgment to prevent any unnecessary injury; and no one shall interfere with or prevent such removal or destruction: *Provided,* That the officer or agent charged with the removal or destruction of an obstruction under this section may in his discretion give notice in writing to the owners of any such obstruction requiring them to remove: *And provided further,* That the expense of removing any such obstruction as aforesaid shall be a charge against such craft and cargo; and if the owners thereof fail or refuse to reimburse the United States for such expense within thirty days after notification, then the officer or agent aforesaid may sell the craft or cargo, or any part thereof that may not have been destroyed in removal, and the proceeds of such sale shall be covered into the Treasury of the United States."

fore abandonment has been established and provides that the expense of such removal shall be a charge against the vessel and its cargo. Should the owner of the vessel fail to reimburse the United States for the expense of removal, the vessel and its cargo may be sold and the proceeds covered into the treasury.

I

Was the Dry Dock a Vessel or Craft Within the Meaning of the Wreck Act?

It is readily apparent that the Rivers and Harbors Act of 1899 was concerned with two, largely if not wholly, mutually exclusive classifications. In §§ 401 and 403, there are prohibitions against the construction of bridges, dams, dikes, causeways, walls, piers, dolphins, booms, weirs, breakwaters, bulkheads and jetties without the prior approval of the Chief of Engineers and the Secretary of the Army, if they extend into or over navigable waters. Excavating, filling or altering the course or capacity of any port, canal or channel is similarly prohibited, unless authorized, and the prohibitions of § 403 are introduced by a general prohibition of any obstruction to the navigable capacity of waters without congressional authorization. These prohibitions are directed, generally, to structures and the product of construction work deliberately erected or created and intruding into or over navigable waters. The primary remedy provided for the removal of any such unauthorized structure is a mandatory injunction requiring its creator to remove the structure or obstruction. The removal, of course, is at the expense of the offender.

In contrast, §§ 409, 411, 412, 414 and 415, collectively known as the Wreck Act, apply to obstructions in navigable waters created by vessels or other water craft anchored,

moored or sunk in navigable waters. Section 409 contains a prohibition against the voluntary or careless sinking of a vessel in a channel, and § 412 makes a willful obstruction by a master, pilot or engineer of a channel in violation of § 409 a violation also of § 403, with a resulting revocation or suspension of his license.

With respect to sunken vessels, however, §§ 409, 414 and 415 clearly recognize the right of abandonment by the owner, and they cast upon the United States the duty and financial burden of removal of an abandoned wreck, except insofar as the United States may reimburse itself from the salvage. The duty of the owner of a foundered vessel is limited to the maintenance of appropriate marking of the wreck until it is either removed or abandoned. After abandonment, even the duty of maintaining adequate marking of the wreck for the protection of other vessels is cast upon the United States.

It is necessary initially, therefore, to decide whether this dry dock was "a vessel, raft or other craft" within the meaning of the Wreck Act so as to make available to the owner the statutory right of abandonment.

In other contexts, a floating dry dock in service, permanently moored to the shore, has been held not to be a "vessel" for purposes of salvage,[6] or for limitation of liability.[7] Shipyard workers upon such a dry dock are not the members of a crew of a vessel in navigation.[8]

The dry dock in service, permanently moored to the land, has most of the attributes of such an extension of the land as a wharf or a dock, but it does not retain that char-

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[6] Cope v. Vallette Drydock Co., 119 U.S. 625.

[7] Berton v. Tietjen & Lang Dry Dock Co., D.N.J., 219 Fed. 763.

[8] Bernado v. Bethlehem Steel Company, 2 Cir., 314 F. 2d 604; DeMartino v. Bethlehem Steel Company, 1 Cir., 164 F. 2d 177.

acter when it has been severed from its attachments to the land and when, under tow, it is moving over navigable waters equipped, as this one was, with a vessel's navigation lights.

We have held several strange craft to be vessels. A floating derrick engaged in pouring concrete for a bridge is one.[9] So is a barge moored behind piles on a river bank and serving as a platform for coal cleaning machinery.[10] We have held that a floating pile driver is a vessel.[11] There are similar holdings elsewhere. Even an offshore drilling platform resting on legs extending to the bottom of the sea has been held to be a vessel.[12]

There are statutory definitions of a vessel. In 1 U.S.C.A. § 3 and 33 U.S.C.A. § 144 (c)(i) (except a seaplane), it is defined as "every description of water craft used or capable of being used as a means of transportation on water." As indicated above, the definition is held to extend to relatively permanent or stationary structures which are in no sense, when serving their primary function, engaged in transportation. Their capability, though more theoretical than practical, brings them within the definition.

This floating dry dock was as capable of use as a means of transportation on water as other specialized craft which have been held to be vessels. During much of the voyage we have described, it had a crewman aboard. It carried portable pumps and navigation lights. It was not designed to carry cargo, but it had been regularly employed in lifting and supporting ocean-going vessels, and there is no reason to suppose that, if occasion arose, it could not have been

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[9] Summerlin v. Massman Const. Co., 4 Cir., 199 F.2d 715.

[10] Jeffrey v. Henderson Bros., 4 Cir., 193 F. 2d 589.

[11] Leary Const. Co. v. Matson, 4 Cir., 272 Fed. 461.

[12] Offshore Company v. Robison, 5 Cir., 266 F. 2d 769.

used, under tow, for the movement of objects from one place to another.

Moreover, in the Wreck Act, itself, there is every indication of a congressional intention that the Act not be narrowly applied to conventional vessels only. It expressly applies to vessels, rafts and other craft. Sections 414 and 415 refer repeatedly to any "sunken vessel, boat, water craft, raft or other similar obstruction." These should not be read as mere redundancies, but the abandonment principle with its public burden of clearance and removal should apply to any obstruction similar to that of a sunken vessel. They encompass, generally, all objects designed and intended to float on navigable waters which, when sunk, would create an obstruction similar to that of a sunken vessel.

A raft of logs is certainly not a conventional vessel, and it has no greater capability for use as a means of transportation than did this dry dock,[13] but a raft of logs is expressly within the reach of the Wreck Act.

We conclude that this floating dry dock while unmoored and under tow was within the Wreck Act, too. When it foundered while under tow, it created an obstruction of the genus of sunken vessels, rafts, craft and similar obstructions.[14] The obstruction is quite unlike the bridges and highways, the piers and the jetties to which §§ 401 and 403 are directed.

A recent decision of the United States Court of Customs and Patent Appeals in the case of United States v. Bethle-

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[13] A raft of logs has been held to be a vessel, however, The Mary, S.D.Ala., 123 Fed. 609; United States v. Marthinson, E.D.S.C., 58 Fed. 765; and Seabrook v. Raft of Railroad Cross Ties, D.S.C., 40 Fed. 596.

[14] Surely, as Bethlehem points out, after the foundering of the dry dock, Bethlehem would not be relieved of its duty under § 409 of marking the wreck because it was not a vessel, raft or other craft.

hem Steel Company ..... F.2d ..... (decided August 4, 1966) does not persuade us to the contrary.

The Court of Customs and Patent Appeals was there concerned with the question of whether certain ship "midbodies" were dutiable. It held that they were because they were not vessels within the statutory definition of the term.

In that case it appeared that conversion of an old T-2 or T-3 tanker into a large ore carrier could be effected by removing the bow and stern sections of the tanker from the midsection, and replacing the old midsection with a new, much longer one. Some of the new midsections were constructed in European yards. Equipped with a temporary bow section and a reinforced stern, each was towed across the Atlantic Ocean to an American yard where the old tanker bow and stern sections were to replace the temporary arrangements effected in Europe. During the ocean crossing, each of these "midbodies" had sleeping accommodations for a crew of eight, each of whom had signed on as a seaman. There were generators for electric power, and light, heat, power, food and radio facilities were all available on each "midbody." Each, of course, carried navigational lights and signals.

Vessels, the carriers of dutible commodities, have traditionally been, themselves, exempt from duty. The importers claimed the traditional, implicit exemption for the "midbody." The Customs Court, Second Division, sustained their protest, but the Court of Customs and Patent Appeals reversed, placing its decision upon the ground that the "midbodies" did not fall within the statutory definition of a vessel, despite the equipment and crew each carried and despite the further fact that it was said to be capable in its then condition of carrying 14,000 tons of cement.

A very different consideration affected the judgment of the Court of Customs and Patent Appeals in deciding

whether or not the "midbodies" were subject to duty. The exemption was not a statutory one, and the Court was concerned with the protection of American industry, shipyards and employees. It was conscious of the fact that if the component parts had been imported from Europe, each would have been subject to duty, and there may have been some reason for treating sub-assemblies, even sub-assemblies as complete and extensive as the "midbodies," as dutiable also. The holding that they were not vessels within the meaning of the traditional exemption from the customs acts, though grounded upon the statutory definition of vessels, does not persuade us that such "midbodies" are not vessels, rafts or other craft within the meaning of the Wreck Act. We think that they clearly were and that, sunk in a navigable channel, one of them would constitute an obstruction, in all respects, similar to the wreck of a vessel complete with permanent bow and stern, which the owner would be required by § 409 to mark and which is subject to abandonment by the owner. That brings it within the literal language of the Wreck Act.

II

Was the Sinking of the Dry Dock Intentional?

The District Court indicated that even if the dry dock was a vessel within the meaning of the Wreck Act, § 409 would not extend the right of abandonment to an owner who intentionally sank his vessel. It found that, while the original intention was not to sink the dry dock in the harbor, after an emergency arose as a result of Bethlehem's negligence, Bethlehem and Moran "deliberately decided to sink the dock in the harbor."

Under a predecessor of § 10 of the Rivers and Harbors Act of 1899, it was held that a ship intentionally scuttled

by its owners created an obstruction which the owner could be compelled to remove at its expense.[15]

In *Hall,* after fire had broken out in a ship and gotten beyond control so that the hull was certain to be lost, the ship was intentionally sunk in a harbor in order to save the rigging from the fire and to permit its salvage by the owner. It was held that such an intentionally created obstruction was a violation of § 10 of the Rivers and Harbors Act of 1890, substantially comparable to § 10 of the Act of 1899, which is now § 403. This suggests that § 15 of the Wreck Act,[16] with its exoneration of the owner, except for the *in rem* liability of the sunken vessel and its cargo, should not be extended for the benefit of the owner when the sinking was the deliberate and intended purpose of the owner in furtherance of his financial interest. The fact that § 412 makes a willful obstruction of a channel, in violation of § 409, also a violation of § 403 may lend some support to the suggestion.

The present case is far from that principle, however.

There was a general original purpose, of course, to sink the dry dock. This purpose arose after it had been found impossible to dispose of the dry dock in the Bay, when no riparian owner would permit use of his land for the purpose of burning the dock and when burning was made impractical by the requirement that its underwater portion be consumed by fire as well as its above water portion. It had been suggested that the dry dock could be sunk beyond the thousand fathom curve, approximately 85 miles at sea, and Bethlehem had obtained official clearance for that venture, contracting to pay Moran a fee of $10,000 for the

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[15] United States v. Hall, 1 Cir., 63 F.2d 472; see also, In Re Eastern Transportation Co., D.Md., 102 F.Supp. 913, *aff'd sub nom* Ottenheimer v. Whitaker, 4 Cir., 198 F.2d 289.

[16] 33 U.S.C.A. § 409.

towage. Clearly, at the outset, however, no one intended to sink the dry dock in the Bay or in Baltimore Harbor, and when sections No. 5 and 7 began to take on water, the purpose of the turn back to Bethlehem's Key Highway Yard was to avoid the possibility of an unintentional sinking in the Bay or the harbor. It was then thought that the flotilla could make the return trip to the Key Highway Yard, but when the stern starboard section of the dock began to hit bottom in Brewerton Channel, it appeared impossible to achieve the Key Highway Yard destination. It was then that the flotilla turned from the channel and headed toward Bethlehem's Sparrows Point steel plant. With the dock riding so low at the stern, there may have seemed little chance that it could reach waters actually controlled by Bethlehem, and it was then known that the dock was in a sinking condition, but the turn out of the channel was for the purpose of minimization of prospective harm. Sharp criticism would justifiably have been levelled at Bethlehem and Moran if they had permitted the dry dock to founder in and obstruct one of the main ship channels in Baltimore Harbor. What was done was dictated by prudence and was accompanied by a strenuous effort to avoid the creation of an extremely hazardous and major obstruction.

Indeed, the District Court found that the initial decision to turn back to Key Highway Yard and the later decision to turn out of Brewerton Channel were both reasonable choices of unpleasant alternatives. Under those circumstances, we cannot accept the ultimate conclusion that there was a deliberate decision to sink the dock in the harbor. The master of a sinking vessel who does all he can to maneuver out of and away from the main channel of commerce can hardly be said to have deliberately decided to sink the ship where it ultimately founders despite the best efforts to

keep her afloat. There was no overt intent to sink the dock in the harbor. That result was neither sought nor desired. No one acted for the purpose of achieving that result. Even after she foundered, the tugs continued their efforts to move her, and continuous pumping of the flooded compartments was maintained for many hours.

This was not a deliberate, intentional sinking.[17]

The fact that the District Court found that the sinking was the consequence of an inadequate inspection of the dry dock before it began its journey, a finding of negligence which Bethlehem stoutly denied, did not affect the nature or charecter of its subsequent volition. There is no suggestion that the dry dock, if unseaworthy at the commencement of the journey, was known by Bethlehem or Moran to have been so at that time. There is no suggestion of any doubt as to her capability to make the voyage to the Atlantic graveyard. What was done after she began to take on water was done in emergency because of the necessities of the situation. Even intentional violations of § 409 are condoned and approved if done under necessity.[18] This is so even though negligence played a part in the creation of the emergency.[19]

III

Does the Presence of Negligence Defeat the Right of Abandonment?

The District Court rejected the contention that when a vessel founders as a result of negligence attributable to the

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[17] See Pollock, First Book of Jurisprudence (6th ed. 1929) 147; Prosser, Torts (2d ed. 1955) 29; Perkins, a Rationale of Mens Rea, 52 Harv. L.R. 905, 911; Holmes, The Common Law (1881) 132; Salmond, Jurisprudence (2d ed. 1907) 328, 339-340.

[18] Atlantic Refining Co. v. Moller (Bohemian Club), 320 U.S. 462; The City of Norfolk, 4 Cir., 266 Fed. 641.

[19] Atlantic Refining Co. v. Moller (Bohemian Club), supra.

owner, the owner has no right of abandonment under the Wreck Act. Here the United States strongly urges its contention that the owner does not, and it now has the support of a recent decision of the Fifth Circuit in United States v. Cargill, Inc., 5 Cir., 367 F.2d 971. We agree with the District Court.

In *Cargill,* it appears that two barges broke from their moorings and sank in the Mississippi River. A few days earlier another barge laden with chlorine gas, placed in the first tier of a tow, removed from immediate observation of the pilot house and bearing the brunt of the sea and the weather, sank. Because of its cargo, agencies of the United States thought special precautions requisite, and the tanks of chlorine gas were ultimately removed by the United States after spending some $3,081,000 on the project. In the companion cases, decided in the same opinion by the Fifth Circuit, judgments upholding the abandonment of the three barges were reversed and the cases remanded for trial of the factual issues of negligence and causation.

Cargill represents an abrupt departure from the theretofore uniform interpretation of the Wreck Act. It had been consistently held that § 403 had no application to the obstruction of navigable waters by a wrecked vessel, at least, if the sinking was unintentional.[20] Some of the cases[21] are not flat decisions that under no condition may § 403 be applied to the wreck of a vessel. They recognize the Hall

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[20] U.S. v. Bethlehem Steel Co. (The Texmar), 9 Cir., 319 F.2d 512; U.S. v. Zubik, 3 Cir., 295 F.2d 53; U.S. v. Wilson, 2 Cir., 235 F.2d 251; In Re Eastern Transportation Co., D.Md., 102 F.Supp. 913, *aff'd* Ottenheimer v. Whitaker, 4 Cir., 198 F.2d 289; The Manhattan, E.D.Pa., 10 F. Supp. 45, *aff'd,* 3 Cir., 85 F.2d 427; U.S. v. Chicago Salvage Corp., S.D.N.Y., 228 F.Supp. 145; U.S. v. Bridegport Towing Line, Inc., D. Conn., 15 F.2d 240; Loud v. U.S., 6 Cir., 286 Fed. 56.

[21] See *Bridgeport Towing Line, Inc., Wilson* and *Zubik, supra.*

exception,[2] which we have considered earlier, where the owner intentionally scuttled his burning vessel to save the rigging from the fire. They limit the exception to that kind of deliberate scuttling, however, and permit the abandonment of the vessel despite the existence of a claim that the sinking was the result of negligence attributable to the owner.

The decision in *Cargill* is presaged only by Judge Browning's dissent in *The Texmar*.

There are two other cases on the periphery of the problem which the United States contends points to the *Cargill* conclusion.

United States v. Republic Steel Corp., 362 U.S. 482, sanctioned an injunction against a deliberate and continuing deposit of industrial wastes in navigable waters with a resulting silting of the channel. This was plainly a violation of the § 403 prohibition against filling or altering a navigable channel. There was no question of § 403's applicability. The difficulty arose from the fact that § 406, which authorized an injunction to enforce § 403, is limited to the removal of unauthorized structures. The Supreme Court found in § 403 an implied authorization of an injunction to prohibit a deliberate and continuing violation of that section. Its holding intimates no extension of § 403 to shipwrecks beyond the *Hall* exception of a deliberate scuttling.

In United States v. Perma Paving Co., 2 Cir., 332 F.2d 754, the government sought reimbursement for its expense in dredging a channel into which Perma Paving had forced silt by overloading its property. This was held to have been a violation of § 403 in its prohibition against filling channels. It was also held that, since the government might

[2] U.S. v. Hall, 1 Cir., 63 Fed. 472.

have compelled Perma Paving to remove the silt, it could recover its reasonable expenses in doing so. In discussing the question of *in personam* liability, reference was made to the cases holding a negligent owner of an abandoned shipwreck immune from personal liability for its removal, and the Court said, at page 758:

> "We need not determine whether if that precise issue should arise in this circuit, we would follow those decisions or Judge Browning's dissent in the Bethlehem case. It is enough here that the detailed provisions with respect to wrecked vessels contained in 33 U.S.C. §§ 409, 411, 412, 414 and 415, afford a far stronger basis for immunizing the owners of wrecked vessels from *in personam* liability for the costs of removal than any of the statutes relevant to this case. Indeed the author of the principal opinion in the Bethlehem case seemingly assumed that the Government could have recovered the costs of dredging the channel on the facts in Republic Steel. 319 F.2d 518."

Though, in our view, peripheral, *Republic Steel* and *Perma Paving* are the inspiration for the new look that the Ninth Circuit focused on the statutes and of the theory which the Fifth Circuit has adopted. This fresh reappraisal requires a similar review in this Court.

Judge Browning's approach, in his dissent in *The Texmar,* essentially is that, while the Wreck Act specifically defines the rights of the United States to remove the obstructions of abandoned vessels and to retain the salvage of vessel and cargo, it does not specifically provide that a negligent owner has no *in personam* liability for the excess removal costs of the United States. Since the Act pro-

hibits careless sinkings in navigable channels, he would imply an appropriate remedy of an enforceable *in personam* liability, just as the Supreme Court in *Republic Steel* found an implied injunctive remedy to prevent a continuing and deliberate violation of § 403. He found comfort in the cases which held or assumed that an owner, who intentionally scuttled his ship, could not escape such *in personam* liability, since the proscription of § 409 applied equally to intentional and careless sinkings.

There are several difficulties with that approach.

It would be supposed that no one ever had reason to believe that he had a right to fill with industrial wastes a navigable channel in use by vessels in commerce. Any such belief could not have survived the earliest predecessors of § 10 of the Rivers and Harbors Act of 1899. It was plain that he was not to do it, and it was no great extension of the statute to hold, as the Supreme Court did in *Republic Steel,* that there was an implied injunctive remedy to terminate a deliberate and continuing violation. *Perma Paving* added a reasonable and logical remedy for the rectification of an established wrong; if one can be required by an affirmative injunction to remove the silt he has deposited in a navigable channel, he may be required to reimburse the United States for its reasonable costs in effecting the removal for him.

In contrast, there has been a recognized right of abandonment of a wrecked vessel, unless scuttled intentionally, without any *in personam* liability for the cost of its removal even if it is an obstruction of navigable waters. This was the assumption of the Congress which enacted the Wreck Act. That was the conclusion of the Court in The Manhattan (United States v. Atlantic Refining Co.), E.D.Pa., 10 F.Supp. 45, citing Winpenny and Chedester v. Phil-

adelphia, 65 Pa. 135. Abandonment had been recognized in § 8 of the Act of September 19, 1890, 26 Stat. 450, which was substantially repeated in 1899 as § 19 of the Wreck Act. The addition of the provisions of § 15 significantly worked no change in the provisions of the 1890 act.

If there was a recognized immunity from an *in personam* liability for the excess cost of removal of an abandoned wreck when the Congress enacted the Wreck Act in 1899, there can be no logical inference of liability in this area by analogy to *Republic Steel* or *Perma Paving*. All of the relevant cases, far closer to the understanding and assumptions of the times than we, find such an immunity predating or implicit in the Wreck Act.[23] This lends weight to their expositions, and undermines any analogy to be drawn from *Republic Steel* and *Perma Paving*.

The theory's (Judge Browning's) reliance upon *Hall* and the subsequent cases, which have recognized the duty of an owner of a ship which creates an obstruction to navigation as a result of an intentional scuttling to remove the obstruction and to pay for the excess cost of removal, seems misplaced, for the Wreck Act itself drew the distinction between willful and negligent sinkings. Intentional and careless sinkings are equally proscribed by § 409, if they create obstructions of navigable waters, but § 412 makes a willful obstruction of a channel by a master or pilot in violation of § 409 a violation also of § 403. This was not so apparent in the Act of 1899, but the present codification of § 16 of the Act does draw a legislative distinction between channel obstructions created intentionally and those created carelessly with respect to the liabilities of the person in charge of the vessel and the penalties to be imposed. The codifiers'

[23] See cases cited in footnote 20.

construction seems reasonable, for the provision in § 16 of the Act specifically making a willful violation of § 16 "a violation of the Act" would have been wholly redundant if not intended to bring it within the proscription of some other section, most logically § 10. An intentional creation of an obstruction of a channel by the scuttling of a vessel has thus been made referable under § 412 to § 403 and its related provisions for mandatory injunctions, but a negligent sinking is not. This is consistent with the general statutory scheme, which we considered in Part I of this opinion. The kind of deliberately erected structure which § 403 contemplates, must be removed at the expense of the owner when it constitutes an unauthorized obstruction of navigable waters, and an injunction is specifically authorized. In contrast, under the Wreck Act, the only expressed consequence of an owner's failure to remove a sunken vessel, if the obstruction was not "willfully" created, is to give the United States the right to treat it as abandoned, remove it and retain the salvage. In this, the statutes draw no distinction between careless and innocent sinkings.

Cargill adds the rationalization that the nation's waterways exist and, at considerable expense, are maintained by the government for public use, and that no one with substantial impunity ought to be allowed negligently to create obstructions in them. There has been, however, a long history of governmental encouragement and support of water-borne commerce. The modern ship construction and operating subsidies are extreme examples. It has thus been thought that the theory of the abandonment principle was that the owner who has lost his vessel has suffered all of the economic loss which should be visited upon him, and that removal of the wreck, if it constitutes an obstruc-

tion to commerce, should be a public obligation.[24] The risk of such liabilities might be a very substantial deterrent of maritime activity or the acceptance of hazardous cargo. The owner of the barge laden with chlorine gas with which *Cargill* dealt is an example. The Government's claim exceeds $3,000,000.[25]

Moreover, since in almost every foundering there will be some basis for a claim of negligence on the part of the owner or operator, extension of an *in personam* liability for a negligently created obstruction would result in great uncertainty and extensive litigation before the obligations of the owners and operators can be ascertained. The old rule, the one which logically derives from the statutes, at least has the virtue of clarity and certainty in application.

For these reasons, we conclude that neither Bethlehem nor Moran, after the tendered abandonment, had any obligation to remove the obstruction created by the sunken dry dock and no *in personam* liability to reimburse the United States for its costs of removal.

We do not consider Bethlehem's contention that the finding of negligence on its part was erroneous, for, even if it was negligent, liability cannot be imposed upon it.[26]

Reversed.

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[24] See H.R. Rep. No. 1826, 55th Cong. 3d Sess. p. 4 (1899) expressing the purpose of the similar provisions of the River and Harbor Appropriation Act of 1899 to "give to the owners of wrecks and abandoned property all possible protection consistent with the essential interests of navigation." See, also, The Manhattan (United States v. Atlantic Refining Co.) E.D.Pa., 10 F. Supp. 45; United States v. Bethlehem Steel Co. (The Texmar) 9 Cir., 319 F.2d 512, 522.

[25] This consideration may have little applicability to a large corporation, such as Bethlehem, or to a vessel bound for the Atlantic graveyard, but the statutes make no distinction between large and small operators or between new and obsolete vessels.

[26] It has not been contended in this case that § 409's proscription against voluntary or careless sinkings in "navigable channels" is inapplicable because the point of the final foundering of the dry dock was well clear of Brewerton Channel. We have assumed, therefore, without undertaking to decide, that the proscrpition is applicable.

SOBELOFF, Circuit Judge, dissenting:

For more than thirty-two years, from 1930 to 1962, Bethlehem Steel Company kept in continuous use a 9400 ton floating dry dock, moored at its Key Highway Yard in Baltimore, Maryland. In 1962, Bethlehem decided to install another dock of greater capacity and dispose of the old one. After investigating various alternatives, such as beaching and burning the old dock on nearby property, Bethlehem decided that it would be cheaper to employ Moran to tow it to sea and sink it there. The journey was undertaken in the early evening of October 17, 1962 but, according to the District Court's detailed findings, neither Bethlehem nor Moran had adequately inspected the dock to ascertain whether it was in condition to withstand the trip. Early on the morning of October 18, the dock began to ship water through one of its pontoons and it was decided to return it to Key Yard. On the way back, however, it filled and foundered and was eventually grounded near Sparrows Point.

The Govenment demanded removal of the wreck by Bethlehem, but Bethlehem declined. The United States than sued to compel Bethlehem to effect removal, and the District Court, after a full hearing, ordered Bethlehem to remove or pay the cost of removal. Since the hearing of this appeal, the United States, deeming the sunken dry dock a menace to navigation, did remove it at an expense of $163,000. In its present posture, therefore, the action is one for the recovery of these costs.

Although I differ in some respects with the District Court's reasons, I think the result reached is entirely correct. I would affirm. I agree with the majority that the District Court erred in holding that the dry dock is not a vessel within the meaning of the Rivers and Harbors Act. The definition of a "vessel" is, as the majority points out, suf-

ficiently broad to encompass the dock. I also agree that it was not intentionally scuttled so as to bring the case within the *Hall* exception. *United States* v. *Hall*, 63 Fed. 472 (1st Cir. 1894). But this is by no means dispositive of the case. To my mind, the controlling question on this appeal is whether it was the congressional purpose to immunize owners from liability for the cost of removing from navigable waterways vessels which have sunk as a result of their negligence. I cannot accept the view that Congress meant to bestow a beneficence on careless owners by nullifying the statutorily declared obligation of such persons to remove obstructions caused by them.

Since the Supreme Court's decision in *United States* v. *Republic Steel Corp.*, 362 U.S. 482 (1960), which, as my brethren recognize, has inspired a "fresh reappraisal" of the Act, two circuits have reached conflicting decisions on the question before us.[1] The Fifth Circuit, in *United States* v. *Cargill, Inc.*, 367 F.2d 971 (5th Cir. 1966), held that negligently sunk vessels are obstructions within the meaning of section 403 and that under section 406 their owners can be required to bear the reasonable cost of their removal. On the other hand, the Ninth Circuit, in *United States* v. *Bethlehem Steel Corp., (The Texmar)*, 319 F.2d 512 (9th Cir. 1963), over the strong dissent of Judge Browning, held that removal costs of carelessly sunk vessels must be shouldered by the Government. Judge Browning, differing in approach but agreeing in result with the Fifth Circuit, felt that, by analogy to *Republic Steel*, a remedy should be

[1] Even before *Republic Steel* the precedents were far from consistent. *Compare* The Manhattan, 10 F. Supp. 45 (D.C. Pa.), *aff'd*, 85 F.2d 427 (3d Cir. 1935), *cert. denied sub nom.* United States v. The Bessemer, 300 U.S. 654 (1937) *with* In re Eastern Transportation Co., 102 F. Supp. 913 (D. Md.), *aff'd sub nom.* Ottenheimer v. Whitaker, 198 F.2d 289 (4th Cir. 1952).

implied from section 409 sufficiently broad to reach the conduct interdicted therein.[2] This diversity of opinion serves to highlight the fact that clarity of draftsmanship is not a hallmark of the Act. A reading of the statutory provisions, with particular attention to the overall purpose of the Act, is thus called for.

The broad objective of the Rivers and Harbors Act of 1899, 33 U.S.C.A. §§ 40 et seq., is to keep the nation's waterways free from hazards to maritime commerce.[3] Section 10, 33 U.S.C.A. § 403, prohibits the creation of unauthorized obstructions to navigation and section 15, 33 U.S.C.A. § 409, declares it unlawful "voluntarily or carelessly" to sink vessel in navigable channels. Sections 12, 19 and 20, 33 U.S.C.A. §§ 406, 414 and 415, enable the United States to effect the speedy removal of hazards created in violation of these provisions. In comprehensively unfolding its "great design," *Republic Steel, supra* at 492, the Act thus brackets the careless owner with the willful one; the distinction drawn is between the innocent, on the one hand, and the deliberate or careless, on the other. While the Act nowhere specifically allocates, as between the Government and the shipowner, the cost of removing sunken vessels, the courts have, since *Hall,* consistently held owners who intentionally scuttle their craft for their private economic benefit personally responsible for removal costs. The statutory grouping of the negligent with the willful militates against different treatment of the two with respect to per-

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[2] Judge Browning recognized that a negligently sunk vessel may be an obstruction within the meaning of section 403, but preferred to base his dissent on the express prohibition against careless sinking contained in section 409. 319 F.2d at 522 n.1.

The Second Circuit, in United States v. Perma Paving Co., 332 F.2d 754 (2d Cir. 1964) carefully refrained from expressing an opinion on the issue before us.

[3] See United States v. Cargill, 367 F.2d 971 (5th Cir. 1966).

sonal liability.[4] This reading of the Act is identical to that given it by the Army Corps of Engineers, which has promulgated a long-standing regulation covering the exact situation presented here.

> * * * a person who wilfully or negligently permits a vessel to sink in navigable waters of the United States may not relieve himself from all liability by merely abandoning the wreck. He may be found guilty of a misdemeanor and punished by fine, imprisonment, or both, and in addition may have his license revoked or suspended. He may also be compelled to remove the wreck as a public nuisance or pay for its removal.[5] 33 C.F.R. 209.410 (1962).

I am not persuaded that the separate and detailed treatment accorded sunken vessels in sections 414 and 415 requires the conclusion that the Government's remedies are limited to removal of the wreck and recoupment of the salvage value of it and its cargo. In furtherance of the

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[4] Cf. The Limitation of Liability Act, 46 U.S.C.A. § 183, which limits the liability of a vessel owner to his interest in the vessel and its cargo *only* where the owner is without "privity or knowledge" of the negligence causing the loss. See Austerberry v. United States, 169 F. 2d 583 (6th Cir. 1948).

[5] This regulation follows an administrative interpretation by the Acting Secretary of War in 1901, only two years after the Act was passed. In response to an inquiry from an attorney regarding the burden of removing a sunken schooner which had been engaged in dredging the Black River for the City of Loraine, Ohio, the Secretary stated:

> Replying to the question whether the burden of removing this boat rests upon the United States, upon the owner by whose negligence it was sunk, or upon the City of Loraine in whose service the boat was engaged, you are advised that as between the city and the owner of the boat it is not necessary for the War Department to decide, but that under the circumstances stated the burden of removing the boat does not rest upon the United States. It is believed the vessel constitutes an obstruction caused by the voluntary or careless acts of those owning or controlling the boat and that the burden of removal rests upon them.

broad purpose of the Act, these sections are aimed at the vessels themselves and are designed to facilitate removal of wrecks thought to menace navigation. The turn of the language suggests not the grant of a personal immunity to the shipowner but the creation of a right in favor of the United States to eliminate obstructions to navigation. Appropriation of the salvage value of the vessels and their cargo merely gives a measure of protection to the Government against the contingency of an insolvent owner.

Nor is it convincing to argue that such separate treatment reflects a congressional purpose to exclude sunken vessels from the class of "obstructions" proscribed by section 403. The logic and common sense of the Act suggest that the elaborate removal procedures of sections 414 and 415 were intended to supplement the Government's right in section 406 to enjoin the removal of structures threatening navigation. They provide a method whereby the Government may act without the need to secure prior judicial sanction, thus implementing the Act's purpose to expedite the removal of hazards impeding the free flow of maritime commerce.

Further, while it is true that section 412 makes a person in command of a vessel who "willfully" obstructs a channel in the manner contemplated in section 409 guilty of a violation of section 403, this does not warrant the implication of a congessional purpose to limit the reach of section 403 to intentionally scuttled vessels only. The definition of an "obstruction" cannot reasonably be thought to turn on whether a person acts deliberately or carelessly. Navigation is impeded no less by a negligently sunk vessel than by one that has been intentionally scuttled, and it is illogical to ascribe to Congress an intent to exclude carelessly sunk vessels from section 403. Neither does it make sense to read

into section 412 a congressional purpose to excuse owners who carelessly cause their vessels to sink, thereby creating obstructions in violation of section 403. Section 412 is aimed at an entirely new class of individuals, masters and pilots, not theretofore encompassed by the Act. Nothing in it supports an attenuation of section 409's explicit condemnation of both deliberate and careless sinkings and section 403's prohibition against the creation of unauthorized obstructions.

We are not compelled to choose between the reasoning of the Fifth Circuit in *Cargill* and that of Judge Browning in *Texmar*. They are not antithetical; each harmonizes with the language as well as the purpose of the Act. Section 409's proscription of both voluntary and careless sinkings seems, as the Fifth Circuit held, but an "emphatic restatement," 367 F.2d at 975, of section 403's prohibition against the creation of unauthorized obstructions. Yet even in the absence of section 403, the imposition in section 411 of criminal penalties for carelessly causing vessels to sink, coupled with the owner's unquestionable section 409 duty to remove sunken vessels, provides a sufficient basis for implying a civil remedy in favor of the United States in its own right and as the representative of others engaged in maritime commerce. See *United States* v. *Perma Paving Co.*, 332 F.2d 754, 758 (2d Cir. 1964); Note, Implying Civil Remedies from Federal Regulatory Statutes, 77 Harv. L. Rev. 285 (1963).

In sum, I have no quarrel with the majority's observation that the Government has long followed policies of encouragement and support of water-borne commerce and has been generous in the provision of subsidies in various forms. But nowhere has Congress manifested such unrestrained benevolence towards owners so as to warrant the

implication of immunity from responsibility for the negligent sinking of vessels. It is an unwarranted extension of these policies for courts to dilute the clear congressional condemnation in section 409 of carelessness causing obstructions to navigation and the equally clear command to remove. Since the District Court found Bethlehem and Moran negligent in failing adequately to inspect the dry dock, I would affirm the judgment below.

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